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PRACTICE
IN
COURTS OF REVIEW

THAT SUBSTANTIALLY FOLLOW THE
COLORADO PROCEDURE.

BY
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¹¹¹
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PREFACE.

In preparing the following little work on practice in courts of review, I have confined myself in the citation of authorities chiefly to decisions of the Supreme Court of Colorado. A careful and exhaustive examination of those decisions shows that almost every question of procedure of any importance in the courts of review has been passed upon by the Supreme Court of Colorado, and the proper procedure indicated, in the published sixteen volumes of the State Reports.

The procedure therein indicated will apply in a great measure to the procedure in the courts of review of nearly every other State, as the principles upon which cases are reviewed are substantially the same under the Code of every State, and the sole difference is in the form of applying them. This difference is often more apparent than real. Thus the appeal without bond stands, in most States, in lieu of the writ of error in Colorado and Illinois, but is practically the same thing, without the necessity of issuing the writs of error and *scire facias*. For the local differences in practice each practitioner must

necessarily look to the Code and decisions of his own State.

This book is not intended to be a treatise on procedure in courts of review, as much as a *guide* to the numerous determinations of questions as to what is the correct procedure, which are to be found in the Supreme Court Reports. Experience teaches that want of familiarity with those decisions occasions the mooting of questions by assignments of error, where the same point has been frequently determined by the Supreme Court. This want of acquaintance with those decisions is not unfrequently caused by the necessity of searching the sixteen volumes of Colorado State Reports, the point sought for not being mentioned in the syllabi, contained in the index to the volume, in which the decision is contained. This book will enable the practitioner to refer to those decisions with greater facility, they being found at those sections, under which he will most probably look for them, save him from assigning errors on points already determined by the court, and also the labor of searching the reports of other States for authorities on points decided by the Supreme Court.

The first portion of the book is a compilation of the constitutional and statutory provisions of the State of Colorado which relate to procedure in the courts of review. The different sections of the Code, which seem to have been injected into that document

at haphazard, have been brought together, so that the sections which relate to each distinctive matter will be found in consecutive order. This constitutes the first chapter.

The second portion of the book takes up the procedure in both courts of review, with the original jurisdiction of the Supreme Court, the Court of Appeals of Colorado having no original jurisdiction, followed by the appellate jurisdiction and procedure of both courts. The procedure in both courts being identical, what is said is applicable to both courts, unless otherwise noted.

The chapter on bills of exceptions has been made full and will be found of much value to practitioners in the trial court, especially the sections which treat of "objections to evidence."

The "writ of error," both in civil and criminal cases, is treated of first; next follows "appeals," until the point is reached at which the procedure in both classes of cases becomes identical.

The chapter on "motions" will be found useful not only in courts of review, but also in the trial courts.

After the "appeal" follows "admission of attorneys," and last, "contested election of judges," of which the Supreme Court has exclusive original jurisdiction.

I submit this work to my brother members of the robe, with the hope that it may serve as a guide to a

correct practice in our courts of review, may relieve practitioners therein from the labor of searching for decisions on points of practice decided by those courts, and the courts themselves from the necessity of reiterating practice decisions, which counsel have failed to notice, on account of their being scattered through the different volumes of the reports. If it prove useful to my brethren in their practice I will have attained the object for which I entered on its preparation. My rule has been to point out "what to do and how to do it," with what should not be done in each case.

JOHN C. FITNAM.

DENVER, COL., *January*, 1893.

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IN

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44. Supreme Court may give judgment or remand.

[The provisions of the Constitution of the State of Colorado which have relation to the Supreme Court, are to be found in article VI of that instrument. We give here only such portions of the Constitution and Statutes as directly relate to the procedure in that court and the Court of Appeals.]

JUDICIAL POWER OF STATE — WHERE VESTED.

SEC. 1. The judicial power of the State, as to matters of law and equity, except as in the Constitution otherwise provided, shall be vested in a *Supreme Court* . . . and such other courts, as may be created by law.

The above section is as it now reads. Prior to the amendment, adopted November 2, 1886, the words: "For cities and incorporated towns" followed the words: "Created by law." As the section, so constructed, prohibited the establishment of other courts, than those for "cities and towns," the Constitution was so amended as to permit of the creation of other courts than municipal courts, and after the adoption of the amendment, the Court of Appeals was created, under this amendment.¹

APPELLATE JURISDICTION.

SEC. 2. The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction *only*, which shall be co-extensive with the State, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law.²

ORIGINAL JURISDICTION.

SEC. 3. It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunc-

¹ Mills' Ann. Stat., § 373.

² Mills' Ann. Stat., § 374.

tion and other remedial writs, with authority to hear and determine the same. And each judge of the Supreme Court shall have like power and authority as to writs of *habeas corpus*. The Supreme Court shall give its opinion upon important questions, when required by the governor, the Senate or the House of Representatives, and all such opinions shall be published in connection with the reported decisions of the Supreme Court.¹

THREE JUDGES — A QUORUM.

SEC. 4. The Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision.²

TERMS TO BE HELD AT THE CAPITAL OF THE STATE.

SEC. 5. At least two terms of the Supreme Court shall be held each year at the seat of government.³

In each year there shall be three terms of the Supreme Court; one beginning on the second Monday in September, another beginning on the second Monday in January and another beginning on the second Monday in April.⁴

WHEN NO QUORUM PRESENT — ADJOURNMENT.

SEC. 6. If there shall not be a quorum of the justices of the Supreme Court present on the first day of any term, the court shall be and stand adjourned

¹ Mills' Ann. Stat., § 375.

² Mills' Ann. Stat., § 377.

³ Mills' Ann. Stat., § 376.

⁴ Mills' Ann. Stat., § 979.

from day to day, until a quorum shall attend; and said court may, there being a quorum present, adjourn to any day specified, as may be deemed advisable.¹

SPECIAL TERMS.

SEC. 7. Special Terms of said court may be called, under such rules and regulations as may hereafter be adopted by said court.²

Rule of Supreme Court in relation to Special Terms.

In pursuance of the above statute the Supreme Court have adopted the following rule :

“Special Terms of this court may be held at any time, upon an order signed by two of the justices of this court, and filed in the office of the clerk, at least fifteen days prior to the day appointed for the assembling of the court. The clerk, on receipt of such order, shall forthwith enter the same, at length, in the records of the court, and give notice of the appointment of such Special Term, and the day appointed therefor, in one or more newspapers published at the seat of government.

“No appeal or *scire facias* shall be returnable to any special term.”³

SUPREME COURT MAY MAKE RULES, ETC.

SEC. 8. The Supreme Court may from time to time institute rules of practice, and prescribe forms of

¹ Mills' Ann. Stat., § 969.

² Mills' Ann. Stat., § 981.

³ Rule 38 of Supreme Court.

process to be used, and regulations for keeping the records and proceedings of the court, not inconsistent with the Constitution and laws of this State.¹

The Supreme Court . . . shall have . . . power to make rules and regulations for governing their practice and procedure in reference to all matters not expressly provided for by law.²

OPEN SESSIONS — ORAL ARGUMENTS.

SEC. 9. "The court shall be in open session as often as shall be practicable, during each of its terms, to hear and determine causes, and oral arguments shall be heard on final hearing in any cause, on request of any party."³

In compliance with the above statute, the Supreme Court has promulgated the following rule :

"Any cause on the submission docket may be moved by either party for oral argument. Such motion shall be delivered to the clerk, and filed with the papers in the cause. Prior to reaching such cause for decision, the court will fix a day for the argument, due notice of which will be given to the parties by the clerk."⁴

To this rule the Court of Appeals has added :

"And the court will, on its own motion, set down any submitted case for oral argument at any designated time, and the clerk will notify the parties."⁵

¹ Mills' Ann. Stat., § 971.

³ Mills' Ann. Stat., § 980.

² Code of 1883, § 431; Code of 1887, § 407. ⁴ Rule 27 of Supreme Court.

⁵ Rule 27 of Court of Appeals.

UNDISPOSED OF CAUSES CONTINUED.

SEC. 10. All suits, matters and causes undisposed of at any term of the Supreme Court shall stand continued to the next succeeding term.¹

OPINIONS AND DECISIONS SHALL BE IN WRITING.

SEC. 11. The opinions of the justices of the Supreme Court, in any matter pending before it, shall be given in writing, and filed with the other papers in the cause, and when the justices are divided in opinion in any case, the final order shall state which of the justices agree to it.²

All decisions given upon an appeal, upon a question of law only, in any appellate court in this State, shall be given in writing, with the reasons therefor, and filed with the clerk of the court.³

SUPREME COURT JUSTICE NOT TO ACT AS ATTORNEY.

SEC. 12. A justice of the Supreme Court shall not practice as an attorney at law, or solicitor in chancery, in any of the courts of the State, nor give advice touching any cause pending or to be brought therein.⁴

A judge of a court of record shall not act as an attorney or counsel in any court or any cause.⁵

¹ Mills' Ann. Stat., § 973.

³ Code of 1887, § 423; Code of 1883, § 447.

² Mills' Ann. Stat., § 972.

⁴ Mills' Ann. Stat., § 974.

⁵ Code of 1887, § 430.

WHEN JUDGE DISQUALIFIED TO SIT IN A CAUSE.

SEC. 13. A judge shall not have a partner, acting as an attorney or counsel, in any court in his judicial district etc., nor shall any Supreme Court judge make out the papers in any action to be tried before his court.¹

A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity in the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action.²

WHEN SUPREME COURT EQUALLY DIVIDED IN OPINION.

SEC. 14. When the Supreme Court shall be equally divided in opinion, on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed.³

LIMITATION TO APPELLATE JURISDICTION.

SEC. 15. In pursuance of the authority found in section 2 of article VI of the Constitution, the act of 1891 provides:

“No writ of error from or appeal to the Supreme Court shall lie to review the final judgment of any inferior court, unless the judgment, or, in replevin,

¹ Code of 1887, § 431.

³ Code of 1887, § 403.

² Code of 1887, § 429; Code of 1883, § 456.

the value found, exceeds two thousand five hundred dollars, exclusive of costs; provided, this limitation shall not apply, where the matter in controversy relates to a franchise or freehold; nor where the construction of a provision of the Constitution of the State or of the United States is necessary to a determination of a case; provided, further, that the foregoing limitation shall not apply to writs of error to County Courts."¹

The above exception of writs of error to County Courts is in pursuance of the constitutional provision regarding writs of error to County Courts, in section 23, article VI of Constitution.

COURT OF APPEALS.

At the session of the General Assembly of 1891, in pursuance of the constitutional amendment removing the restrictions which heretofore existed on the power to establish other courts than those specifically designated in the Constitution, the Legislature established a new court of review, and designated it by the name of "*The Court of Appeals*." The following are the principal provisions of the act, so far as they concern the procedure therein.

COURT OF APPEALS — JURISDICTION — JUDGES.

SEC. 16. There is hereby established a court, which shall have appellate jurisdiction only, and which shall

¹ Act in relation to courts of review, approved April 6, 1891. L. 1891, p. 118.

be called "*The Court of Appeals.*" Said court shall consist of three judges, who shall possess the qualifications required of judges of the Supreme Court.¹

JURISDICTION OF SAID COURT AS TO SUBJECT-MATTER.

SEC. 17. The said court shall have jurisdiction: First. To review the final judgments of inferior courts in *all* civil cases, and in all criminal cases *not capital*. Second. It shall have *final* jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or, in replevin the value found, is two thousand five hundred dollars or less, exclusive of costs. Third. It shall have jurisdiction, *not final*, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State or of the United States is necessary to the decision of the case. Also in criminal cases, and upon writs of error to County Courts. Writs of error from or appeals to the Court of Appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the Supreme Court.

A COURT OF RECORD — SEAL — MAY ISSUE ALL NECESSARY WRITS.

SEC. 18. The Court of Appeals may issue all necessary writs and processes in causes within its jurisdic-

¹ Section 2 of Court of Appeals Act. L. 1891, p. 118.

tion, in the same manner and with the same effect as the Supreme Court. It shall be a court of record and have a seal.

MAY ADOPT RULES — PROCEDURE SIMILAR TO
THAT OF THE SUPREME COURT.

SEC. 19. The Court of Appeals shall have power to adopt rules, regulating the procedure therein, in the same manner and with the like effect as the Supreme Court; provided, that such proceedings shall be so far similar to that of the Supreme Court as in the judgment of the judges of said Court of Appeals may be practicable.

CAUSES PENDING IN SUPREME COURT MAY BE
TRANSFERRED TO COURT OF APPEALS.

SEC. 20. Any cause now pending in the Supreme Court, within the jurisdiction of the Court of Appeals, may by order of the Supreme Court, upon notice to the parties or their attorneys of record, be transferred to the Court of Appeals for determination, unless objection to such transfer be interposed within thirty days after service of the notice aforesaid.

TERMS OF COURT.

SEC. 21. Terms of Court shall be held at the capital (of the State) at such times as may be fixed for the terms of the Supreme Court.¹

¹ See § 5, *ante*.

WRITS OF ERROR FROM AND APPEALS TO SUPREME COURT.

SEC. 22. Writs of Error from and appeals to the Supreme Court shall lie to review every final judgment of the Court of Appeals, which might have been taken to the Supreme Court in the first instance. Such writs of error shall be sued out, or appeals taken within sixty days after the rendition of the final judgment, and not thereafter.

CAUSES TRANSFERRED TO SUPREME COURT — WHEN.

SEC. 23. Any case in the Court of Appeals, not within the final jurisdiction thereof, shall be transferred to the Supreme Court, upon motion of a defendant in error or appellee, made within such time as such party may be, by law or rule of court, required to file a brief in the case. Such case shall be for hearing in the Supreme Court, the same as if originally taken there, and all bonds and other obligations shall remain in full force and effect. When any such case is taken to the Supreme Court, all pleadings, abstracts, papers, briefs, and other things pertaining to the case shall be transferred to the Supreme Court, *and* new briefs and abstracts shall not be required, except by special rule in particular cases.

Appeals (from the Court of Appeals) and writs of error (from the Supreme Court to the Court of Appeals) shall be made a *supersedeas* in the same

manner, and under the same conditions as in cases brought from other courts.¹

On the transfer of a case pending in the Court of Appeals to the Supreme Court, in compliance with section 18, all unfiled arguments and briefs must be filed in the Supreme Court, and the time of filing is the same as that for cases originally taken to the Supreme Court.

Code Provisions Regulating the Procedure in the Supreme Court and in the Court of Appeals.

APPEALS.

By virtue of section 4 of the Court of Appeals Act (§ 19, *ante*) the provisions of the Code, which regulate the procedure in the Supreme Court, apply also to the procedure on appeal and writ of error in the Court of Appeals. Hence it will be understood that the following sections of the Code apply both to the Supreme Court and to the Court of Appeals, so far as they regulate practice and procedure.

APPEALS TO THE SUPREME COURT — WHEN ALLOWED.

SEC. 24. Appeals to the Supreme Court from the district, county and superior courts shall be allowed in all cases where the judgment or decree appealed from is final, and shall amount, exclusive of costs, to

¹ Court of Appeals Act of 1891. L. 1891, p. 118.

the sum of one hundred dollars, or relate to a franchise or freehold.¹

The foregoing section, as to the amount (one hundred dollars), *only* is repealed by the Court of Appeals Act of 1891, so far as an appeal to the Supreme Court is involved, and now no appeal can be taken to the Supreme Court from any inferior court of record, unless the judgment be for a sum exceeding "*Twenty-five hundred dollars, exclusive of costs.*" It is, however, apprehended that the Code section is in full force as to appeals to the Court of Appeals, and that no appeal will lie to that court unless the judgment amount to one hundred dollars exclusive of costs. There is, however, some doubt as to this. The question does not seem to have been as yet directly raised in the Court of Appeals, so as to require a positive adjudication on this point. In the case of *Commissioners v. Mining Co.* (1 Colo. App. 126), incidentally involving this question, the court says: "If this case had been appealed to this court subsequent to its creation by statute, *it may be*, that it would be our duty to consider it on its merits." This is the only intimation on that point made by the court, so far as is to be found in its published reports. The Court of Appeals has entertained a number of appeals, where the amount involved was less than one hundred dollars.

¹ Code, § 388. Amended, Laws 1889, p. 77.

APPEAL — WHEN TO BE PRAYED.

SEC. 25. Such appeal shall be prayed for within five days from the time of rendering the judgment or decree. The prayer for appeal may be made to, and the order therefor may be made by the judge in vacation, in case the court is not in session during the whole of the five days allowed therefor.¹

CONDITIONS ON WHICH APPEAL MAY BE GRANTED.

SEC. 26. The party praying for such appeal shall, by himself, or agent or attorney, give bond with sufficient surety, to be approved by the court from which the appeal is taken (or the clerk thereof, when the order granting such appeal may so direct), and file in the office of the clerk of the court from which the appeal is taken, within the time limited by the court or judge, which bond shall be in a reasonable sum, sufficient to cover the amount of the judgment appealed from and costs, conditioned for the payment of the judgment, costs, interest and damages, in case the judgment shall be affirmed, and also for the due prosecution of the appeal.²

TRIAL COURT MAY DISPENSE WITH OR LIMIT SECURITY — WHEN.

SEC. 27. The trial court or judge may dispense with or, limit, in his discretion, the security required by this

¹ Code, § 388. Amended, Laws 1889, p. 77.

² Code, § 388. Laws 1889, p. 77.

act, when the appellant is an executor, administrator, trustee, or other person acting in another's right. When a municipal corporation is the appellant, the court or judge shall direct a stay of execution without filing a *supersedeas* undertaking.¹

SUPREME COURT MAY ALLOW APPEAL BONDS
AMENDED.

SEC. 28. The Supreme Court may, in its discretion, allow defective appeal bonds to be amended.²

RECORD — WHEN TO BE FILED.

SEC. 29. The appellant shall lodge in the office of the clerk of the Supreme Court an authenticated copy of the record of the judgment or decree appealed from, by or before the third day of the next term of the Supreme Court. Provided, that if there be not thirty days between the time of making the appeal and the sitting of the Supreme Court, then the record shall be lodged as aforesaid, at or before the third day of the next succeeding term of the Supreme Court. Otherwise the said appeal shall be dismissed, unless the Supreme Court shall have granted further time for good cause shown.³

ORIGINAL BILL OF EXCEPTIONS MAY BE TAKEN TO
THE COURT OF REVIEW.

SEC. 30. When a bill of exceptions, duly signed, is filed in the court from which the appeal is taken,

¹ Code, § 395.

² Code, § 388.

³ Code, § 389.

the same may, by the appellant, be filed in the original form in the appellate court. And when such bill of exceptions seeks to embrace depositions, the same may be done by reference without copying the same in full, and such deposition so referred to shall thereby become a part of the bill of exceptions and may be transferred to the files of the Supreme Court. Deeds and other papers offered in evidence may be expressed in bills of exceptions, by stating their purport and effect, so far as pertinent to the decision in the appellate court. If the parties below fail to agree upon the essential parts of such papers, they shall be expressed in substance or at length, as the judge signing such bill of exceptions shall, in his discretion, decide.¹

ANY ONE OF THE PARTIES (DEFENDANT) MAY
APPEAL.

SEC. 31. In all cases where a judgment or decree shall be rendered in any court, in any case whatever, either in law or in chancery, against two or more persons, either one of said persons shall be permitted to remove said suit, by appeal or writ of error, and for that purpose shall be permitted to use the names of all said persons, if necessary.

But no costs shall be taxed against any person who shall not join in said appeal or writ of error, and all such cases shall be determined in said Su-

¹ Code, §§ 392-400.

preme Court as other suits are, and in the same manner as if all the parties had joined in said appeal or writ of error.¹

JUDGMENT ON DISMISSAL OF APPEAL.

SEC. 32. In all cases of appeals to the Supreme Court, where the appellant shall fail to prosecute his appeal, the Supreme Court shall, on dismissal of the appeal, enter judgment against the appellant for not less than five nor more than twenty per cent upon the amount of the judgment, for damages in consequence of the delay occasioned by the appeal.²

SEC. 33. The dismissal of an appeal may, by order of the court, be made, without prejudice to another appeal or writ of error; but, unless another appeal or *supersedeas* be taken within thirty days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmance of the judgment of the trial court, so as to make the sureties on the undertaking, given by the appellant or plaintiff in error, liable on such undertaking.³

DUTY OF CLERK OF TRIAL COURT ON DISMISSAL OF APPEAL IN COURT OF REVIEW.

SEC. 34. When an appeal or writ of error shall be dismissed by the Supreme Court, or the judgment of the lower court affirmed, it shall be the duty of the clerk of the court from which said appeal or writ of

¹ Code, § 400.

² Code, § 391.

³ Code, § 397.

error was prosecuted, upon a copy of the order of the Supreme Court dismissing said appeal or writ of error, or affirming said judgment, being filed in his office, to issue execution on said judgment and proceed thereon in all respects as though no appeal or writ of error had been prosecuted from said judgment.¹

COURT OF REVIEW MAY GIVE FINAL JUDGMENT AND
ISSUE EXECUTION — PROCEEDINGS SUBSEQUENT TO
FINAL JUDGMENT REVIEWABLE.

SEC. 35. In all cases of appeals and writs of error, the Supreme Court may give final judgment and issue execution, or remand the case to the lower court that execution may be there issued, or that other proceedings may be had therein.

Upon appeal from or error to a final judgment judicial proceedings in the trial court, subsequent to such judgment, may be reviewed in the Supreme Court in like manner and with like effect as matters occurring prior thereto.²

WRIT OF ERROR.

WRIT OF ERROR, WHEN LIES — AMENDABLE.

SEC. 36. Writs of error shall lie from the Supreme Court to every final judgment of any court of record of this State. Such writ of error shall be amendable, and all writs of error, wherein there shall be any variance from the original record, or any other defect, may be amended and made agreeable to such

¹ Code, § 399.

² Code, § 398. Amended, 1889.

record by the respective courts where such writs are or shall be made returnable.¹

TIME TO BRING WRIT — EXCEPTIONS.

SEC. 37. A writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of. But when any person thinking himself aggrieved by any judgment or decree that may be reviewed in the Supreme Court shall be an infant, *non compos mentis*, or imprisoned when the same was rendered, the time of such disability shall be excluded from the said three years.²

SCIRE FACIAS — SEPARATE WRITS TO DIFFERENT COUNTIES.

SEC. 38. In all cases in which a writ of error shall be issued, the clerk of the Supreme Court shall also issue a *scire facias* or summons to hear errors directed to the sheriff or other officer of the proper county where the defendant or defendants reside or may be found, commanding him to summon the defendant or defendants in error to appear at the next term of the Supreme Court, and show cause, if any he or they have, why the judgment or decree mentioned in the writ of error should not be reversed. If there are several defendants residing in different counties, the plaintiff in error may have separate writs issued to each of the counties where such defendants reside.³

¹ Code, § 406.

² Code, § 401.

³ Code, § 404; rules 2 and 3, Supreme Court.

SERVICE OF SCIRE FACIAS BY PUBLICATION.

SEC. 39. If the plaintiff in error, or other person for him, shall, at any time, file in the office of the clerk of the Supreme Court an affidavit, setting forth that the defendant has gone out of the State, so that process cannot be served upon him ; or that he is not a resident of this State ; or on due inquiry cannot be found ; or is concealed within this State ; or evades service of process ; or that process cannot be served upon him, it shall be the duty of the clerk to cause publication of notice to such defendant to be made in some newspaper published in this State, setting forth the pendency of the writ of error, the names of the parties, the time when *scire facias* or summons may be returnable, which notice shall be published for four consecutive weeks ; and if the first insertion of such notice shall not be at least sixty days before the return day of the writ of error, the cause shall be continued to the next succeeding term of the Supreme Court, *and* it shall be the duty of the plaintiff in error, or some one for him, to send postpaid by mail a copy of such notice to the defendant in error, if the place of residence of him shall be known to, or after diligent inquiry can be ascertained by, the plaintiff in error ; *and*, upon filing a certificate of the publication of such notice made by the publisher of the newspaper in which the same shall be published, together with an affidavit that copies of such notice

have been sent to the defendant in error, as herein provided, or that the residence of the defendant is unknown to, or cannot after diligent inquiry be ascertained by, the plaintiff in error, the cause shall proceed as if the defendant had been personally served with process.¹

WRIT OF ERROR — WHEN A SUPERSEDEAS.

SEC. 40. No writ of error shall operate as a *superseas* unless the Supreme Court, (or if application be made therefor in vacation) some justice of the Supreme Court, after inspecting a copy of the record in the cause, shall order said writ to be made a *supersedeas*, nor until the party applying for such writ shall file a bond in the office of the clerk of the Supreme Court, with the conditions required in cases of appeals, approved by the court or justice, allowing such order for *supersedeas*, or if such order shall so direct, then by the clerk of some court of record. The clerk issuing such writ of error shall indorse thereon that it shall be a *supersedeas* and operate accordingly ; *and* the parties in writs of error shall be subject to the same judgment and mode of execution as provided in cases of appeal.²

MOTION FOR NEW TRIAL NOT NECESSARY.

SEC. 41. A motion for a new trial shall not be necessary to enable the Supreme Court to review the

¹ Code, § 405.

² Code, § 402.

judgment and orders of the inferior court, when the matters alleged as errors have once been passed upon by such court against exceptions made at the proper time.¹

ORIGINAL PAPERS WHEN TO BE TRANSMITTED TO THE SUPREME COURT.

SEC. 42. When the review of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the Supreme Court, who shall hold the same subject to the control of the court.²

WHEN COURT EQUALLY DIVIDED IN OPINION.

SEC. 43. When the Supreme Court shall be equally divided in opinion, on hearing of an appeal or writ of error, the judgment of the court below shall stand affirmed.³

SUPREME COURT MAY GIVE JUDGMENT, OR REMAND.

SEC. 44. The Supreme Court, in case of a partial reversal, shall give such judgment as the inferior court ought to have given, or remand the cause to the inferior court for further proceedings as the case may require.⁴

¹ Code, § 393.

² Code, § 396.

³ Code, § 403.

⁴ Code, § 390.

CHAPTER II.

The Supreme Court and Court of Appeals — Their Jurisdiction and Powers.

THE SUPREME COURT.

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THE COURT OF APPEALS.

54. The Court of Appeals.
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JURISDICTION OF THE SUPREME COURT.

SEC. 45. The Constitution of the State of Colorado confers upon the Supreme Court a two-fold jurisdiction, the one ORIGINAL; the other APPELLATE and SUPERINTENDING.

ORIGINAL JURISDICTION OF THE SUPREME COURT.

SEC. 46. The Constitution confers upon the Supreme Court power to issue the writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction and other remedial writs, with authority to hear and determine the same.¹ It is held by the Supreme Court that section 3 of article VI of the Constitution confers upon the Supreme Court a jurisdiction in the cases mentioned, which is *original* in contradistinction to the appellate authority previously conferred; and that the writs mentioned in said section are not thereby given to be used in aid of, or in connection with its appellate authority, but for the purpose of instituting original causes or proceedings.²

This section constitutes the Supreme Court a court of original jurisdiction in the class of cases mentioned therein; that is, gives it authority to take cognizance of those causes from their inception; permits any of them to be commenced in the first instance in the Supreme Court, and empowers the

stitution, art. VI, § 3. ² *Wheeler v. Irrigation Co.*, 9 Colo. 248.

court to hear and finally determine the issues of law or fact, which are properly in the cause. It is not necessary, therefore, that the cases mentioned in the section be initiated by process issuing from a court of record, inferior to the Supreme Court, be there heard and determined in the first instance, in the usual course of procedure, and be then removed by appeal or writ of error to the Supreme Court.

THE MENTION OF THE CASES IN SECTION 3 IS A
LIMITATION ON THE ORIGINAL JURISDICTION OF THE
SUPREME COURT.

SEC. 47. Construing a similar provision of the Constitution of their State, the Supreme Court of Nebraska say :

“ The designation of these cases, in which the court has original jurisdiction, is a direct prohibition of original jurisdiction in other cases. The maxim : ‘ *Expressio unius est exclusio alterius* ’ applies, and excludes original jurisdiction in other cases, than those mentioned.”¹

In addition to the original jurisdiction conferred by the above provision of the Constitution, the Legislature has conferred on the Supreme Court original jurisdiction of contests of the election of County, District and Supreme Court judges, they being the

¹ Bell v. Templin, 26 Neb. 249; Wheeler v. Irrigation Co., 9 Colo. 248.

only judges of courts of record of the State, who are elected by the people. This grant of original jurisdiction would be unconstitutional, had not the Constitution provided in another portion of that instrument, that the General Assembly might designate the courts and judges by whom election contests may be heard and determined. It is held by the Supreme Court that the Legislature has no power to enlarge the jurisdiction of the court, in violation of a prohibition of the Constitution, as implied in section 3, article VI thereof.¹

ORIGINAL JURISDICTION TO DISBAR AN ATTORNEY.

SEC. 48. The Supreme Court has also original jurisdiction of proceedings to disbar an attorney, who is charged with such malconduct, as on proof thereof will render him in the judgment of the court an unfit person to practice the profession of the law. It derives this jurisdiction from the exclusive authority given it to admit an attorney to practice in all the courts of the State, and as to the Supreme Court, its power to disbar attorneys, practicing in it, from practicing in the Supreme Court, is inherent in the court at common law. The disbarment from practice in other courts of record is a consequence only of the disbarment in the Supreme Court, by operation of the statute.

¹ Constitution, art. VII, § 12; Mills' Ann. Stat., § 1656.

PRACTICE OF THE SUPREME COURT AS TO CASES WITHIN
ITS ORIGINAL JURISDICTION.

SEC. 49. Though vested by the Constitution with authority to entertain original jurisdiction in the class of cases mentioned, the practice of the court is to decline to take cognizance of such cases, in the exercise of its original jurisdiction, unless the cause is one which involves the interests of the public, as distinguished from the interest of the party who desires to institute the proceeding, and in which the interest of the public is the principal reason for hearing the questions to be determined in the case, or in cases, where some peculiar exigency requires the interposition of the Supreme Court in the first instance.¹ The reasons of this practice are that the appellate jurisdiction to review the judgments of inferior courts of record by writ of error or appeal, is the *primary* jurisdiction of the Supreme Court, and its original jurisdiction is only *secondary*, and to be exercised only when an application for the writ may not be properly made to some other court, which is empowered to issue and hear and determine the proceeding on the desired writ.²

For this reason the Supreme Court has adopted the following rule, as to the manner in which its original jurisdiction is to be invoked :

“Where an application is made to the court for a writ, to be issued in the exercise of its original juris-

¹ *In re Rogers*, 12 Colo. 278. ² *People v. Richmond*, 16 Colo. 274.

diction, and for which an application might lawfully have been made to some other court in the first instance, the petition shall * * * also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court," etc.

The sufficiency of the circumstances, which are set forth in the application as reasons why the Supreme Court shall issue the writ in the first instance, and take original cognizance of the case, is determined by the court, in its refusal or allowance of the application for the writ.¹

In *Wheeler v. Irrigation Co.*, *supra*, the court distinctly enunciates the rules that guide it in taking cognizance of causes, of which original jurisdiction is given it by the Constitution :

"We are clearly of the opinion that original jurisdiction should be entertained only in cases involving questions *publici juris*, and that the writs from this court should be put only to prerogative uses. As a rule, the Supreme Court will exercise its original jurisdiction in cases wherein the rights of the litigants only are involved, only when there exists some unusual and extraordinary reason for its taking cognizance of the case."²

It follows, therefore, from the rule of the court above cited, that no one of the writs of which original

¹ Rule 47 of Supreme Court. ² *Johnson v. Young*, 13 Colo. 382.

jurisdiction is granted to the court by the Constitution, will be issued as of course, or in any case, in which a court of record, inferior to the Supreme Court, has authority to issue such writ in the first instance, and hear and determine the same, unless the court is satisfied, from the circumstances stated in the application, that the interests of the public, as distinguished from the interest of the applicant, will be best promoted by the court taking original cognizance of the cause. This rule is rigidly adhered to by the court, even in cases of State officers, and in cases involving the duties of State officers, such as *mandamus* to the State auditor, treasurer, etc.

ORIGINAL JURISDICTION, HOW INVOKED.

SEC. 50. Practitioners will note, that no one of the writs, of which the Supreme Court has jurisdiction, may be issued by the justices in their individual capacity, or except by the court, sitting as a "court." So it has been ruled by the Supreme Court of California, in the earlier volumes of its reports, that the clerk has no authority to issue any one of the original writs, of which the Supreme Court has jurisdiction by the Constitution, until such writ has been allowed by the court, sitting as a "court." In every such case a specific order must be made by the court in the particular cause, directing the clerk to issue it. The only exception to this rule is the case of a writ of *habeas corpus* which may be issued by an individual

justice of the Supreme Court, under the amendment of the Constitution, giving to the justices, as distinct from the court, the power to issue such writ. It is then issued by the justice and not under the hand of the clerk and seal of the court.

The exercise of its original jurisdiction is invoked by a petition, which should set out the grounds on which petitioner bases his application for the specific writ, addressed to the court. It should be verified by the petitioner, and is then presented to the court at a public sitting thereof. The petition for the specific writ should contain a concise, but full and complete statement of each and every fact, upon which the applicant bases his application, as showing *prima facie* his right to have the Supreme Court issue the particular writ in the first instance. For though he may have the right to have the particular writ issued by some court of competent jurisdiction, such right will not entitle him to have the particular writ issued by the Supreme Court in the first instance, and he must in his petition set out fully the special circumstances that warrant the application to the Supreme Court.

As each and every one of the writs, of which the Supreme Court has original jurisdiction, may in all ordinary cases be granted by a District Court of the proper county, the petition must strictly comply with the requirements of Rule 47 of the Supreme Court, unless it appear on its face that the writ must be

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addressed to a District Court, or to a judge of a District Court. In such case the Supreme Court alone will have jurisdiction to grant the particular writ, as the Court of Appeals has no power to issue any original writ, except the writ of error.

If the court be not publicly sitting, the petition may be placed in the hands of one of the justices, for consideration by the court, which is usually had by the justices in the recess of the court, but the order, by which the court announces its allowance or disallowance of the prayer of the petition, is made at a public sitting of the court.

ORIGINAL CASES, HOW TO BE BROUGHT — RELATOR.

SEC. 51. In *Wheeler v. Irrigation Co* the Supreme Court thus indicates the proper procedure, in cases in which the exercise of its original jurisdiction is invoked :

“Cases, of which this court should take original jurisdiction, involving, as in general they must, questions of public right, should be brought in the name of ‘the people.’ The State or the public being the main party in interest, although individual advantage may be gained, the person instituting the proceeding should appear as ‘relator.’ It is also eminently fitting, that such causes be inaugurated before this court by the attorney-general, or with his consent, or at least that the refusal of that officer to act be shown. We do not declare such consent or refusal to be abso-

lutely necessary. If the main object of the proceeding is to vindicate a public right to protect the interest of the State in its sovereign character, to prevent the illegal use of a public franchise as against the people generally, or a considerable portion thereof, or if it be to subserve the public interest in any of the other matters hereinbefore mentioned, a citizen could probably institute the proceeding in the name of the people, without consulting the attorney-general."

While the above mode of procedure is indicated as the correct one, it does not follow that the petition must be entitled in the name of the people. The common-law rule, which controls the court in this class of cases, forbids the petition being entitled in any case, since no cause is pending in any court, until the writ is allowed by the court. Upon the allowance of the petition, the cause then becomes a cause in the Supreme Court, and thereafter should be entitled, "The people, on the relation of, relator," in all proceedings and papers filed therein by either party. Upon the allowance of the writ by the court, application ought to be made to the attorney-general for his consent to the use of his name in the prosecution of the action. Ordinarily the attorney-general will permit his name to be used by reputable counsel, employed by the parties in interest, though he take no active part in the prosecution thereof. It will be advisable to make this application

to him in writing, and request a written consent or refusal. If he consent, his appearance for the relator will then be entered in the Supreme Court, and thereafter his name will be signed, with that of the other counsel, to all papers and pleadings on behalf of the relator. If he decline to permit his name to be used, of which the written refusal will be evidence, a motion should be made to the court for leave to prosecute, without the use of the name of the attorney-general. It is held by the Supreme Court of Wisconsin, under a similar provision of law to that of Colorado, that the signature of the attorney-general, to pleadings filed in original cases in the Supreme Court, is only a matter of form, and not indispensable, and that that officer has a discretion in reference to instituting or refusing to institute original suits in the Supreme Court, which the court cannot control, but which does not deprive the court of the right to authorize them to be instituted without his consent.

A very appropriate mode of bringing before the court the consent or refusal of the attorney-general in such cases, is that adopted by the Supreme Court of Wisconsin, in a recent case. In that instance the court made an order on the application of the petitioner, that the attorney-general institute the proceeding in the Supreme Court within a specified time, or make known to the court his reason for refusing to do so. If, on the expiration of the specified period

of time, the attorney-general files his written grounds for refusing to institute the proceeding, and the court, on due consideration of such reasons, is of opinion that the public interest will not be subserved by the prosecution of that proceeding in the Supreme Court, the petitioner will be remitted to some other court of competent jurisdiction. But if the reasons alleged by the attorney-general are not satisfactory, or the court is of opinion that the determination of the questions involved will be beneficial to the public, as the court will have passed already upon the sufficiency *prima facie* of the facts stated in the petition, as grounds for allowing the writ to issue, it will usually permit the cause to be prosecuted by the relator.

This motion should be made before the writ is issued, especially in cases where an alternative writ or rule to show cause issues in the first instance.

These and other preliminary matters, if any, having been determined by the court, in most cases a rule to show cause why the writ asked for by petitioner shall not issue is ordered to be served on all persons interested adversely to the petitioner, and a day certain for the return of the rule is appointed therein. On the appointed day for the return of the rule, if parties interested adversely appear to resist the granting of the petition, the pleadings proper in the case are then filled in due order, and time is given each party to file briefs and arguments in support of his views. The procedure in *quo warranto*, and prob-

ably in the case of the other writs mentioned in the Constitution, is according to the common-law procedure, as it existed at the time of the adoption of the Constitution, and not according to the provisions of the Code of Civil Procedure. The writs and the procedure under them was well known at the time of the Constitution, and the framers of that instrument are held to have specified the particular writs as they then existed, and were in use in the common-law courts.¹

If the court be of opinion, on hearing of the petition, that the relief which the petitioner seeks by the proceeding can be obtained as effectually in a District or other court which has jurisdiction to hear and determine the cause in the first instance, and no special reason appears why the Supreme Court should take original cognizance of the cause, it will deny the petition, and if a rule to show cause has been issued, the rule will be discharged, and the petitioner will be advised to present his petition to such District or other court.²

JURISDICTION OF JUDGES IN HABEAS CORPUS.

SEC. 52. Prior to the constitutional amendment of 1886, by which each judge of the Supreme Court, is given like authority with the Supreme Court in cases of *habeas corpus*, it was held that the original

¹ *The People v. Curley*, 5 Colo. 417; *People v. Reed*, 11 Colo. 140.

² *In re Rogers*, 14 Colo. 18.

jurisdiction to hear and determine cases of *habeas corpus* was vested in the court only, and could not be exercised by the individual judges of that court, though authority to do so was given them by the statute.¹

The procedure on *habeas corpus* either before the Supreme Court or before one of the judges, under the amendment to the Constitution, which gives the justices of the Supreme Court jurisdiction to hear and determine a writ of *habeas corpus*, is governed by the provisions of chapter 60 of Mills' Ann. Statutes, entitled "*Habeas Corpus*." But as a general rule, the Supreme Court will not entertain an application for a writ of *heabas corpus*, if it appear that the application can be made to a District Court or to a judge of the District Court, and can properly be heard by him. Hence it is only when the imprisonment, claimed to be illegal, is upon a conviction or judgment of a District Court, which it is alleged is for any reason absolutely void, either because the trial court exceeded its jurisdiction, or where the law, under which the judgment rendered, is alleged to be unconstitutional, that the Supreme Court will hear the application. If the judgment is merely voidable, it will remit the applicant to his writ of error.

This same rule applies where the discharge is claimed by reason of a violation of the Two Term Act included in the *Habeas Corpus* Act, which entitles a

¹ *In re Garvey*, 7 Colo. 502.

prisoner to his discharge from imprisonment, if not brought to trial before the third term of the court having jurisdiction.¹

The decision *In re Garvey*, 7 Colo. 507, as to power of justices of Supreme Court in *habeas corpus*, when sitting as a justice, and not as a court, is no longer law.

There does not appear to be any law, in force in Colorado, which gives to the Court of Appeals, or to the justices of that court, any jurisdiction to issue or hear and determine a writ of *habeas corpus*. Its power being simply revisory, it has no original jurisdiction whatever, and being a statutory court, can take no jurisdiction by implication, or unless from some express statute in relation to itself. It is held by the Supreme Court that, while the writ of *habeas corpus* is a common-law writ, and does not exist merely in virtue of the statute of Charles II, yet it cannot be issued by any court or judge unless expressly authorized to do so by statute of this State. See *In re Garvey*, *supra*. Hence the Court of Appeals, not being authorized by statute to issue the writ, it can only act in a *habeas corpus* case by way of review, on writ of error.

THE APPELLATE JURISDICTION.

SEC. 53. Except in the cases, where a limited original jurisdiction is expressly conferred, the *primary* and *principal* powers, conferred upon the Supreme

¹ Mills' Ann. Stats. 2108-2113.

Court by the Constitution, make it essentially a court of review only, in exercising its appellate jurisdiction, as conferred by section 2 of article VI. In all matters not within its original jurisdiction, its powers are *exclusively* appellate. But it is held that it is within the power of the Legislature to lodge in some other court jurisdiction to review and determine *finally*, that is, not subject to review by appeal or writ of error to the Supreme Court, an enumerated class of cases; the Constitution specifying *the kind*, but not the *quantum*, of its jurisdiction as a court of review.

The Supreme Court is the court of last resort in the State; from its judgments there is no appeal to any other State tribunal, and its decisions are binding upon the rest of the State courts and judges, as final adjudications of what is the law of the State. Every other court, established by statute, whatever be the powers conferred upon it, is necessarily subordinate to the Supreme Court, subject to its superintending control, and must be guided and governed by the decisions of the Supreme Court, determined in the exercise of its appellate power. Hence it has the inherent power to review, on appeal or writ of error, the proceedings of all courts of record of the State, and their judgments, rendered in actions and proceedings had therein, subject to the limitations imposed by the Legislature, as to the *quantum* or *money limit* of the judgment or decree, which it may review.¹

¹ People v. Richmond, 16 Colo. 274.

THE COURT OF APPEALS.

SEC. 54. At the session of the Legislature, which was held in 1891, there was created an intermediate court of review, subordinate to the Supreme Court, and having final jurisdiction, as specified in the act, in an enumerated class of cases, which is denominated : "THE COURT OF APPEALS." Immediately upon its organization its constitutionality was attacked by a *quo warranto* proceeding in the Supreme Court, and after learned and exhaustive argument by some of ablest jurists of the State, it was held by the Supreme Court, that it was within the power of the General Assembly to establish such court, under the amendment to the Constitution ; *provided*, its judgments be made subject to review by the Supreme Court, and that the General Assembly might make an enumerated class of causes, decided by such court, not subject to review by the Supreme Court. In the opinion it is further held, that the General Assembly may define the limits of the jurisdiction of the Supreme Court, by a *specification of a money* limit, but can not with draw from its jurisdiction any *kind* of cases.

This decision sets at rest all doubts as to the constitutionality of the court, and the legality of its organization.¹

In consequence of this act, there are at this time two appellate courts, both distinctively courts of *re-*

¹People v. Richmond, 16 Colo. 274.

view, in existence in the state : The Court of Appeals and the Supreme Court. Except in criminal cases, which are capital, the jurisdiction of the two *courts is concurrent in all cases*, but that of the Court of Appeals is subordinate to the Supreme Court, and its judgments are subject to review by it, in all cases except *certain enumerated classes*.

JURISDICTION OF THE COURT OF APPEALS.

SEC. 55. By section 4 of the Court of Appeals Act the jurisdiction of the court is defined as follows: The said court shall have jurisdiction:

First—To review the final judgments of inferior courts of record in *all* civil cases, and in *all* criminal cases, *not capital*.

Second—It shall have *final* jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment or in replevin the value found, is two thousand five hundred dollars or less, exclusive of costs.

Third—It shall have jurisdiction, *not final*, in cases where the controversy involves a franchise or freehold, or where a construction of a provision of the Constitution of the State, or of the United States, is necessary to the decision of the case ; *also* in criminal cases, and on writs of error to County Courts.

Hence it appears that a judgment of the Court of Appeals is not subject to review by the Supreme Court, in *any civil case*, where the judgment or decree

rendered by it is for a sum not exceeding twenty-five hundred dollars, exclusive of the costs of the action. Under the provisions of the act, no appeal or writ of error will lie to the Supreme Court, if the amount of the judgment be twenty-five hundred dollars or less, but the appeal from the judgment, or the writ of error, must be from the Court of Appeals.

In *all* criminal cases, however, a writ of error will lie from the Supreme Court to the final judgment of the Court of Appeals therein.

Hence the party appealing or seeking a writ of error has his election as to a choice of the court, to which he may appeal, in all cases of a civil nature, where the judgment is *over* twenty-five hundred dollars, or in a non-capital criminal case. He may go in the first instance to the Court of Appeals, or to the Supreme Court, if he so elect. If he go to the Court of Appeals in the first instance and be dissatisfied with its judgment, he may then go to the Supreme Court. It seems also that *capital* cases, in which a judgment or death sentence has been pronounced by the trial court, must be taken directly by a writ of error to the Supreme Court, and that the Court of Appeals has no jurisdiction thereof.

It will be noted that the Court of Appeals has no jurisdiction to issue *any of the original* writs, of which the Supreme Court has original jurisdiction, except in aid of its jurisdiction as an appellate court, and

when necessary to the exercise of its powers as a court of review. It is exclusively a court of review. It can issue no writs, unless it becomes necessary to do so, as a means of exercising the powers pertinent to a court of review, but, by section 7 of the act, when necessary to issue such writs and process in aid of its appellate jurisdiction, it can do so in the same manner and with the same effect as the Supreme Court issues like writs.

TRANSFER OF CAUSES FROM SUPREME COURT TO THE COURT OF APPEALS.

SEC. 56. Section 5 of the Court of Appeals Act provides for the transfer of causes which were, at the time of its passage, pending in the Supreme Court, by appeal or writ of error, to the Court of Appeals, when such cause might have been taken originally to the Court of Appeals instead of the Supreme Court. As the Court of Appeals has jurisdiction to take cognizance of every kind of civil case and all criminal cases not capital, this section seems to permit a transfer of any case, civil or criminal, not pending in the Supreme Court in the exercise of its original jurisdiction, to the Court of Appeals, except cases wherein a death sentence has been pronounced by the trial court.

The act provides that the transfer shall be made on notice to the parties or their attorneys of record, but does not specify on whose motion the transfer

shall be ordered. It seems that such transfer may be made on the court's own motion, or on application of either of the parties, and it becomes effective, unless an objection to the transfer is made within thirty days after service of the notice of the motion by one of the parties. The notice of the motion should be given in writing, if on the court's motion, to both parties to the appeal or writ of error; if on motion of one of the parties to the adverse party. The time for hearing the motion is to be stated in the notice, and at a convenient time thereafter the Supreme Court will hear the objection, if any be interposed, to the transfer. The act does not provide that the Supreme Court may hear and pass upon the sufficiency of the objection made, and if it deem the objection insufficient, direct the transfer. It seems that the fact of any objection, no matter what it may be, will preclude the Supreme Court from making an order for the transfer, and that such transfer can be made only when all parties consent to it, either expressly or by failure to object thereto, within thirty days after a notice of intent to transfer the cause to the Court of Appeals.

This provision is made expressly applicable only to causes pending in the Supreme Court on the 6th day of April, 1891.

There is a class of cases, which, it seems, may be transferred under the provisions of this section, wherein, if originally brought to the Court of Appeals,

an appeal to, or a writ of error from, the Supreme Court will lie. In such case, if a transfer from the Supreme Court to the Court of Appeals be made, can an appeal be taken from the final judgment of the Court of Appeals to the Supreme Court, by appeal or writ of error?

The statute is silent, but if an appeal will lie, had the case been originally taken to the Court of Appeals, it seems that it will be governed by the same rule as other cases.

TRANSFER OF CASES FROM THE COURT OF APPEALS TO THE SUPREME COURT.

SEC. 57. Section 15 of the Court of Appeals Act also provides that any case, brought in the first instance to the Court of Appeals, which might have been taken, in the first instance to the Supreme Court, under section 1 of the act, may be removed to the Supreme Court by appellee or the defendant in error. To effect such removal, the judgment appealed from must be one, which under section 1 of the Court of Appeals Act, was appealable to the Supreme Court directly.

The only persons who may ask the transfer of a cause under this section are the appellee in an appealed case and the defendant in a writ of error. Neither appellant nor the plaintiff in error is entitled to ask such removal, for the reason that they might have taken the case in the first instance to the

Supreme Court. No reason for such removal appears to be required to be given by the party asking the case to be transferred, but on his application the cause is to be transferred as of course. The proper procedure in such case is to give a written notice of the application to the adverse party. The court will then, at the time mentioned for hearing of the application, make the required order. It seems that the court has no discretion to grant or refuse such order.

TIME WITHIN WHICH APPLICATION MUST BE MADE.

SEC. 58. The time within which an application to transfer a cause to the Supreme Court must be made, is the same as is the time within which the party applying for the transfer is required by law or rule of court, to file his brief in the case in the court.

By rule 21 of the Supreme Court, which is also in force in the Court of Appeals, the appellee or defendant in error is required to file his brief in the cause, only, when the plaintiff in error or appellant has filed his abstract and brief, in pursuance of rule 20, that is, within sixty days after the filing of the transcript of the record in the Court of Appeals. Hence, if such abstract be not filed in time, or if brief be not filed in time, unless appellee or defendant in error desire to have the cause heard *ex parte*, there would seem to be no need of an application for the transfer, as under rule 18 he may have the appeal or writ of error dismissed. But, when the adverse

party has fully complied with the rules, the application to transfer may be made at any time between sixty and one hundred days after the transcript has been filed in the clerk's office.

When a cause is transferred under this section, the cause is docketed in the Supreme Court, and the transcript of the record, and all papers filed in the Court of Appeals, prior to the order of removal, including abstracts, briefs, etc., are sent to the Supreme Court, with a copy of the order of transfer. The papers sent to the Supreme Court are the original papers filed, not transcripts of them, as is the usual practice in appeals from trial courts. Nothing thereafter of the case will remain or be found in the Court of Appeals except the record entries of such orders, as may have been entered on its journal in the cause prior to its removal. After being docketed in the Supreme Court the cause stands on the same footing as other cases therein. If the party asking the transfer has not filed his brief in the Court of Appeals before the transfer, he should do so within the time prescribed, had it been brought in the Supreme Court. No new abstracts or briefs, in lieu of those filed at the time of transfer, are to be required, except by a special rule entered in the particular case.¹

All subsequent proceedings are had in the Supreme Court in such case, and are governed by the rules prevailing in that court.

¹Sess. Laws 1891, p. 118.

LIMIT OF APPELLATE JURISDICTION OF SUPREME COURT.

SEC. 59. The appellate jurisdiction of the Supreme Court which is brought into exercise by writs of error and appeals, extends to *final* judgments only of the trial courts of record throughout the State. Unlike the Supreme Courts of many Code States, it can entertain no appeal from or issue a writ of error to any order or judgment of a trial court, until a final judgment has been rendered in the action or proceeding, but it reviews all intermediate orders made in the cause by the trial court, on a review of the final judgment, if such intermediate order be properly brought to its attention by bill of exceptions, duly signed and filed, if such intermediate order be substantially erroneous and injurious to the plaintiff in error or appellant.¹

Under the Code of 1877 the power to review intermediate orders by a direct appeal therefrom was given to the Supreme Court, but it was repealed in 1879. The same provision was again given in 1885, but again withdrawn in 1887, and during its existence met with but little favor from the Supreme Court. This power of review extends to all *final* judgments of every court of the State which acts under State authority and is a court of record. It extends to both civil

¹ Wehl v. Keebs, 6 Colo. 167; Schwabacker v. Rush *et al.*, 81 Ill. 310; Schulenberg v. Farwell *et al.*, 84 Ill. 400; Wasson v. Cone, 86 Ill. 46.

and criminal cases. In criminal cases, where the penalty is death, the power to review the judgment of the trial court is in the Supreme Court *exclusively*, and cannot be exercised by the Court of Appeals. In all other criminal cases, the review may be had by the Court of Appeals, and its judgment may be then reviewed by the Supreme Court.¹

But by the first section of the act of 1891, the right to review the judgments of courts of record inferior to the Supreme Court, is limited to cases of a civil nature, in which the final judgment of the trial court, or in replevin the value found, exceeds twenty-five hundred dollars exclusive of the costs of the action. In addition to this, if the action relate to a franchise or freehold, or if the decision of the case requires the court to construe a provision of the United States or of the State Constitution, the Supreme Court will have jurisdiction. It also has jurisdiction to issue writs of error to County Courts in all cases. It will be borne in mind that the Court of Appeals has concurrent jurisdiction in all the above-mentioned cases with the Supreme Court, but such jurisdiction must be exercised in subordination to the power of the Supreme Court to review the judgment of the Court of Appeals by appeal or writ of error.

¹ People v. Richmond, 16 Colo. 274.

FINAL JUDGMENT — AMOUNT AS TEST OF JURISDICTION.

SEC. 60. To give either of the courts of review jurisdiction to review any cause, civil or criminal, the *first* requisite is that the judgment be *final*.

The courts invariably hold that a *final* judgment is a judgment which determines the essential questions in the controversy between the litigating parties, and leaves the controversy in such a condition that a court of review, if it affirm the judgment, would direct the trial court to proceed in due course to execute the judgment it has already rendered. If the judgment rendered leave open for further determination any of the essential questions of the controversy, the judgment is not final.¹

But the finality of the judgment is not affected by the fact of the cause being reserved for further directions in regard to the mode of executing the judgment or decree, or for further orders of the court in relation to matters incidental thereto, if the merits of the controversy are finally adjudicated. A judgment that is conclusive of any question which is at issue properly in the case by the pleadings filed is held to be "a final" judgment as to that question.

Thus in the case of *Daniels v. Daniels*² the Supreme Court holds that an appeal will lie under the Code of 1885 from a judgment awarding alimony

¹ *Daniels v. Daniels*, 9 Colo. 139.

² *Id.* 140.

pendente lite and suit money, as it was rendered in an original proceeding, seeking a separate and independent relief, and requiring the entry of a separate judgment. In support of its views it cites *Sharon v. Sharon*, 7 Pacific Reporter (California), 456; *Lochnane v. Lochnane*, 78 Ky. 468; *Hecht v. Hecht*, 28 Ark. 92; *Blake v. Blake*, 80 Ill. 523; *Foss v. Foss*, 100 id. 576; *Stillman v. Stillman*, 99 id. 196, and other decisions, holding such a judgment to be appealable.

The *second* requisite is that the amount of money, or the value of the property in replevin found for the successful party, in case of appeal to the Supreme Court, or writ of error from it, exceed two thousand five hundred dollars, exclusive of the costs of the action. In this respect the act of 1891 differs from the act of Congress conferring jurisdiction on the Supreme Court of the United States in cases where the *matter in dispute* exceeds five thousand dollars, as the Colorado Act makes the "*final*" judgment the test of jurisdiction. Thus, without regard to the amount that may have been in controversy, the condition of jurisdiction in the Supreme Court is that the judgment be for a sum *exceeding* two thousand five hundred dollars, in addition to the costs. This jurisdiction must appear by the record of the judgment. If the judgment be for two thousand five hundred dollars or less, then no appeal to or writ of error from the Supreme Court will lie, and the party

desiring a review of the judgment must resort to the Court of Appeals. But there are some exceptions to this rule, which will be hereinafter noted.

INSTANCES OF "FINAL" JUDGMENTS, WHICH ARE REVIEWABLE ON WRIT OF ERROR OR APPEAL.

SEC. 63. *Mandamus*. A writ of error lies to review the proceedings by a district judge, had in vacation,¹ he having entered what purports on its face to be a final judgment, which determined the merits of the controversy.

A final judgment, which is *void* on its face. A writ of error lies to review what assumes to itself the force of an adjudication in law, even though upon the face of the record it may want the essentials of validity.²

Decree of Probate Court to sell, etc. A decree of a Probate Court, made upon an administrator's petition to sell real estate of deceased to pay debts, is reviewable on writ of error.³

Attachment; traverse. The rulings of the trial court, made on the trial of the issues on traverse of an affidavit for an attachment of property, are reviewable.⁴

Condemnation proceedings under the Eminent Domain Act are reviewable, when the judge denies a

¹ Bean v. People, 6 Colo. 98.

² Skinner v. Beshoar, 2 Colo. 383; Cooper v. Ins. Co., 3 Colo. 318.

³ Vance's Heirs v. Rockwell, 3 Colo. 240; Sloan v. Strickler, 12 Colo. 179.

⁴ Wehle v. Kerbs, 6 Colo. 167.

motion to set aside the award. Such denial of the motion is such a final determination as will entitle the party aggrieved to a review of the proceedings in a court of review.¹

In condemnation proceedings where an interplea is filed by one who claims the condemnation money, and without trying the issues raised by the interplea the court awards the money to another party, such action of the court is a sufficient final judgment to entitle the party interpleading to have it reviewed by a court of review.²

The denial by the trial court of a *petition* for leave to intervene in a pending action will entitle the petitioner to a review of the judgment or order denying such petition.³

A decree of *restitution*, in an action for injunction for affirmative relief, under section 159 of Civil Code, is a final judgment, and appealable.⁴

WHAT IS A JUDGMENT.

SEC. 61. The theory of the law is to provide as adequate as possible redress for every wrong and injury done to the person or property of individuals. This redress is ordinarily obtained through trials in courts organized for that purpose, and the adjudications of such courts, after a patient and full hearing

¹ R. R. Co. v. Jackson, 6 Colo. 340.

² Hutchinson v. McLaughlin, 15 Colo. 492.

³ Henry v. Ins. Co., 16 Colo. 179.

⁴ Sprague v. Locke *et al.*, 1st Ct. of Appeals, 171.

of the causes of complaint of the plaintiff and the defenses of the adverse parties, and the evidence produced by each in support of his plaint or defense. The court is governed by a line of decisions of judges of courts reaching back into distant ages, upon subjects of similar character, which is commonly known as the "*common law*," in adjudicating the rights of the several parties, which common law is supplemented by statutory enactments and the decisions of the highest courts of the respective states down to the time of its adjudication. In redressing the wrong which is the subject of the action, the court uses its reasoning powers, aided by the reasoning powers of other judges, as made known by their written opinions, in cases nearly, if not in all respects, similar, and with such aids determines whether the parties are entitled to any legal redress, and if entitled, what redress is proper in the case.

When it has arrived at what it deems the proper conclusion, it then makes known its decision, which is termed its judgment. Such judgment is understood to pass upon and decide every point, which is essential to a correct decision of the controversy. It is not indispensable that such decision be made a matter of record, to constitute it a "judgment." The oral declaration of the conclusion to which it has arrived, if intended to be a judgment, constitutes it a judgment, in law.¹

¹ Sieber v. Frink, 7 Colo. 151.

But the wisdom of ages has prescribed that all judgments so rendered shall be reduced to writing, and entered of record in the record books of the court, that the actual judgment and its contents may be preserved for future use. This record, however, is merely the written evidence of what was the actual decision of the court in the particular case, and of the contents of such judgment. Though the record be destroyed by either accident or design, the judgment will yet remain unaffected by such destruction.

CLASSES AND KINDS OF JUDGMENTS.

SEC. 62. Prior to the adoption of the Civil Code, judgments in all actions at common law were known as judgments; judgments pronounced in cases of equitable cognizance by courts of equity were termed "decrees," while a large class of judgments made during the progress of the cause, during its different stages, of a merely interlocutory character were and are called "orders."

But under code practice all judgments, whether at law or in equity, are termed "judgments."

Judgments are of various kinds. *First.* Where the facts are all admitted by the parties, or rather the facts set up by the plaintiff in his complaint, or defendant in his answer, are admitted by the adverse party, and the court is called upon by a demurrer to determine the law of the case. This is termed a judgment on demurrer, and may be final, if the party

demurring, not satisfied with the decision, elects to abide by his demurrer and take the question of law to the court of review for its determination. In such a case the court renders a final judgment in favor of the party for whom the demurrer is decided.

Second. Where the facts are determined by a jury in common-law cases, and by the court on a trial to the court in equity cases. This is the more frequent and usual class of judgments, which may become final.

Third. Judgments for want of an answer to the complaint or reply to new matter in an answer, commonly known as judgments by default, where the failure to answer or reply is taken as an admission of the truth of the facts stated in the pleading not answered.

All these judgments are final, and an appeal from or writ of error to them is maintainable.

No writ of error or appeal is maintainable to any order made during the progress of the cause, under the Colorado Civil Code, but all such orders are reviewed, if proper exception be taken in time, on an appeal from or writ of error to the final judgment in the case.

Every judgment should, on its face, show the time when rendered, the place where the court was sitting, the court by which it was rendered, the matter in dispute and the final determination announced by the court as to the rights of the litigants therein. If

the judgment entry state the foregoing facts sufficiently, the mode or form of such statement is not material. Every court may follow its own formula, but the record must clearly show that it was the intention of the court to render a final judgment in the action. Hence, mere findings of the court are not a final judgment.¹

Common-law forms are habitually employed in Colorado practice in the entry of common-law judgments, as follows: "It is, therefore, considered and adjudged by the court, that," etc. In equity cases decrees are usually drawn by counsel and submitted to the court for approval and for the court's signature, and follow the usual forms of decrees in equity.

No appeal, separate from the appeal from the final judgment in the action, or writ of error to, it *will lie* from an *interlocutory judgment* in any action or proceeding. Under the present practice all interlocutory orders and judgments are reviewable only on the appeal or writ of error to the final judgment. So findings of the court or verdict of a jury, when a final judgment has not been entered thereon, are reviewable only in the same manner.²

¹ Alvord v. McGaughey, 5 Colo. 246.

² Andrews v. Loveland, 1 Colo. 8; Armor v. Lyon, 1 Colo. 7; Vance's Heirs v. Rockwell, 3 Colo. 240.

FRANCHISE — FREEHOLD — CONSTRUCTION OF A PROVISION OF THE CONSTITUTION.

SEC. 64. In addition to final judgments for a specified sum of money, rendered by trial courts of record, the Supreme Court has jurisdiction to review any judgment of such courts, which involves a "*franchise*" or a "*freehold*."

A *franchise* is defined as a "particular privilege conferred upon individuals by grant from the State." It is usually granted to a corporation for the purpose of enabling it to do certain things, and is vested in the corporate entity as distinguished from the officers of the corporation.¹

Public offices are not franchises.

A *freehold* directly involves the title to land.

To justify an appeal to the Supreme Court directly or a writ of error from the Supreme Court, on the ground that the matter in controversy relates to a freehold, the title to the freehold must have been directly, and not merely incidentally or collaterally, the subject of the action, which it is sought to remove to the Supreme Court for review. The judgment in the action in the trial court must be conclusive of the right of freehold until it is reversed. The pleadings must put in issue the ownership of the fee, and the necessary result of the judgment must be to determine to which of the parties litigant the freehold belongs.

¹ Brandenburg v. Reithman, 7 Colo. 324; Rose *et al.* v. Choteau 15 Ill. 167; McGuirk v. Burrey, 93 Ill. 118; Pinneo v. Knox, 100 Ill. 471; Clement v. Reitz, 103 Ill. 315.

Hence an action, in which it is sought to determine the title of land, when the title is the principal question at issue, is appealable to the Supreme Court, without any regard to its money value. It follows, therefore, that any action, whatever its nature, relating to land, which does not directly require a determination of the ownership of the fee, is not appealable to the Supreme Court, under this provision. Of this character are actions of forcible entry and detainer, actions to foreclose a mortgage, and actions to establish or foreclose any other lien on real property.¹

When in an action the construction of a provision of the State Constitution, or of that of the United States, becomes indispensable to the proper decision of the case, the cause may be taken directly to the Supreme Court for review. The decisions of the United States Supreme Court on "Federal Questions" will furnish a useful guide in this class of cases. The construction of the provision of the Constitution, either of the State or of the United States, must be an essential question in the action and must have received the attention of the trial court. If the decision of the trial court can be sustained, without deciding the constitutional question, and the latter is not an essential element of its decision, the cause is not subject to be taken to the Supreme Court in the first instance.

¹ Clement v. Reitz, 103 Ill. 315.

The foregoing provisions as to franchise, etc., are not of such importance as they would be, if the Court of Appeals had not jurisdiction to entertain and determine them, since such cases may be taken to the Supreme Court, under subdivision 3 of section 4 of the Court of Appeals Act, by appeal from or writ of error to the judgment of the Court of Appeals in such cases. For further matter on freehold, see Appeals, *post*, sec.

JURISDICTION TO REVIEW—HOW CALLED INTO ACTION.

SEC. 65. The Supreme Court and the Court of Appeals both exercise their appellate jurisdiction from inferior courts of record in two distinct modes ; the one by means of the *writ of error*, the other by an *appeal* from the judgment of the trial court.

As by section six (6) of the Court of Appeals Act the procedure in the Court of Appeals is required to be as far similar to that of the Supreme Court as in the judgment of the judges of the Court of Appeals may be practicable, and as the judges of the Court of Appeals have adopted the rules of the Supreme Court, with unimportant exceptions, as the rules of the Court of Appeals, all that will hereinafter be stated relating to procedure and practice in the courts of review, will be applicable to the procedure in both courts, unless the difference in the procedure is expressly pointed out.

CHAPTER III.

Of Writs of Error.

- SEC. 66. Writ of error — what is a.
67. Proceeding in error a new suit.
 68. Parties to writ of error.
 69. Procedure, when record of trial court does not show who are the proper parties.
 70. Procedure by defendant in error, if improper parties are joined.
 71. Who plaintiff in error.
 72. Procedure, when one, who should be a plaintiff in error, refuses to be a party to the proceeding.
 73. When a writ of error will lie.
 74. No separate writ of error to proceedings subsequent to final judgment.
 75. Writ of error — statute of limitations.
 76. Procedure to procure a writ of error.
 77. Writ of error — contents.
 78. Issuance of writ is jurisdictional.
 79. Writ of error — how served.
 80. *Supersedeas* — how procured.
 81. Procedure to procure *supersedeas*.
 82. Form of *supersedeas* — bond.
 83. Effect of *supersedeas*.
 84. Return on writ — when a *supersedeas*.
 85. *Supersedeas*, when appeal dismissed without prejudice.

WRIT OF ERROR — WHAT IS A.

SEC. 66. Error is a proceeding, in the nature of an appeal, known to the common law, which is instituted

for the purpose of obtaining a review by a court of review of the proceedings had and of the final judgment rendered in an action at common law, which has been prosecuted to a final judgment. The ground upon which this review is asked is, that the trial court has committed errors, in its rulings and decisions on the various questions which have arisen during the progress of the cause, resulting in a judgment, which are claimed to be prejudicial to the party prosecuting the proceeding in error, and require its reversal or modification by the court of review.

The proceeding in error, commonly termed a writ of error, at common law, could be brought only on a final judgment, or an award in the nature of a final judgment. Practically the writ brought up the entire record of the cause to the court of review, and the review had in the latter court was confined to only such matters as appear in the record, as brought up.¹

The writ of error is common-law process, and where the common law is in force, as it is in Colorado by virtue of statutory enactment, no legislation other than that adopting the common law is necessary to carry it into effect. The writ of error is fully equipped for service by the common law, and the authority and power of courts of review, which are vested with appellate jurisdiction, by the Constitution and laws of this State, to hear and determine all causes brought into them for review by means of

¹ 2 Tidd's Pr. 1134, 1142, 1143; Steph. Pl. 142.

a writ of error, in proper cases, is complete without any legislation thereon by the General Assembly. The jurisdiction is derived from the common law, and not from any special legislation granting it to the court.

The writ of error, as it exists in Colorado, is as it was used by the Courts of England prior to the fourth year of the reign of James the First, and any subsequent changes in the practice thereunder in England are of no force in Colorado, unless adopted by special legislative enactment of the Territory or State of Colorado.¹

The Code of 1877 abolished the writ of error in civil cases, except writs of error to County Courts, which are preserved by a provision of the Constitution, and substituted therefor the appeal as provided therein. But the Legislature of 1879 restored the writ of error as it previously existed, and since that date it continues in existence in the procedure in civil cases, and has been constantly recognized in the legislation of the State.

The writ of error is an *original* writ, which issues out of a court of review, having appellate jurisdiction of common-law causes, for the purpose of removing into such appellate court the record of the cause, in the trial court, in which the party applying for such removal alleges error to exist prejudicial to him, and sufficient to authorize the court of review to reverse

¹ Stebbins v. Anthony, 5 Colo. 273.

such judgment, for the purpose of having such record reviewed by the appellate court.

The writ issues under the seal of the court of review and the hand of its clerk ; is directed to the clerk or keeper of the records of the trial court, the proceedings and judgment of which is complained of as erroneous, and commands such clerk or keeper of its records to certify to the court of review, out of which the writ issues, a full and correct transcript of its record of that particular action or proceeding. The writ of error must describe *specifically* (1) the particular record and judgment of the trial court ; (2) the action or proceeding therein, in which such judgment was rendered ; (3) the parties, both plaintiffs and defendants, to the action or proceeding in the trial court, and (4) must allege to whose injury the errors complained have intervened.¹

As the sole office of the writ of error is to procure the removal or transfer of the record of the particular action or proceeding in the trial court to the court of review, by means of an authenticated transcript thereof, and as it is issued by the clerk of the appellate court, it is unnecessary to give the form of such writ herein. As to the defendant in error, it has no office to perform. No action on his part is required by it, nor can it affect him in any manner. The sole parties to such writ are the court of review

¹ Rule 1 of Supreme Court ; Vance's Heirs v. Maroney, 2 Colo. 293.

and the clerk of the trial court. Hence, the defendant in error can properly make no motion in the appellate court, attacking the sufficiency of the writ, or its service. If any error or defect be found therein, a motion in relation thereto should properly come from the plaintiff in error, as it is his interest to see that a correct writ of error be issued and be properly served, and that errors or defects in it be corrected in apt time.¹

PROCEEDING IN ERROR A NEW ACTION.

SEC. 67. Under repeated decisions of the Supreme Court of Colorado and of other States, the proceeding by writ of error is a new action, distinct from that which was pending in the trial court, which it is sought to have reviewed by the court of review. Unlike the proceeding by appeal from the judgment of the trial court, it is not a continuation of the original action in the trial court.

Being an entirely new action, having for its object a review of the final judgment of the trial court, and there being no authority, under the present procedure in Colorado, to take a writ of error to any other than the final judgment, it follows that a final judgment, which disposes of the action on its merits, must have been pronounced by the trial court, before a writ of error can be properly sued out. Hence as the entire term of the trial court is in con-

¹ Rule 1 of Supreme Court; *Vance's Heirs v. Maroney*, 2 Colo. 293.

temptation of law only one day, and as the record of the cause is subject to be changed or modified by the court at any time prior to the adjournment of the court for the term, a writ of error will be prematurely instituted, if it is sued out at any time before the trial court has finally adjourned for the term.¹

So it is ruled that the writ of error must be sued out within the time prescribed by the statute of limitations as to bringing a writ of error, or it will be barred. But the statute will not begin to run until the end of the term of the trial court at which the final judgment was rendered. On the same principle it is held that, when the sole plaintiff in error is a non-resident of the State, at the time of instituting his proceeding in error, he is subject to the provisions of the chapter of the statutes, entitled "*Costs*," and must give security for the costs of the action.²

PARTIES TO WRIT OF ERROR.

SEC. 68. As the purpose for which a proceeding in error is instituted is to reverse or modify a judgment, rendered in an action or proceeding in a trial court of record, which judgment is claimed to be prejudicial to the party prosecuting the proceeding in error, it is apparent that only a party to the action in the

¹ Webster v. Gaff, 6 Colo. 475; Wise v. Brocker, 1 Colo. 90.

² W. U. T. Co. v. Graham, 1 Colo. 184; Tapley v. Doane, 2 Colo. 299; Filley v. Cody, 3 Colo. 221; Roberts v. Fales, 32 Ill. 474; Ripley v. Morris, 2 Gilm. 281; Hickman v. Haines, 5 Gilm. 20; Smith v. Robinson, 11 Ill. 119; International Bank v. Jenkins, 114 Ill. 143; Tidd's Pr. 1141.

trial court can be a party to the writ of error, or when such party is deceased, his legal representatives, or those in privity with him. Persons in privity with an original party to the action are usually the executor or administrator of his estate, if he have deceased before the suing out of the writ of error, and his heirs, if real property be involved in the litigation, and all persons who will be directly affected by the judgment of the trial court. It follows, therefore, that all persons who will be directly affected by the affirmance or reversal of the judgment reviewed or by its modification in any respect, must be made parties to the writ of error.

The person in whose name the writ of error is sued out is denominated the plaintiff in error, and the adverse party is known as the defendant in error.

In many cases the parties to the action stand in the same relative position in the court of review as they occupied in the trial court; but not infrequently their positions are reversed, and the defendant in the trial court is the plaintiff in error in the court of review.

When suing out a writ of error the attorney for the plaintiff in error should be careful to ascertain the names, both christian and surname, of all persons who are necessary parties to the proceeding in error, both as plaintiffs and as defendants, and give their names to the clerk of the court of review for insertion in the writ of error. The better practice, however,

is for him to file a written *precipe* for a writ of error, giving therein the full christian and surname of each person therein named, as either a plaintiff or as a defendant in error. The names thus given will be inserted in both the writ of error and in the *scire facias* to hear errors, and only after a service of the *scire facias* can the question of nonjoinder or misjoinder of parties be raised.

PROCEDURE WHEN RECORD OF TRIAL COURT DOES
NOT SHOW WHO ARE THE PROPER PARTIES.

SEC. 69. It will sometimes happen that the transcript of the record sent up from the trial court does not show who are the proper parties to the writ of error. This will be occasioned by the death of the original parties to the action, or of some one or more of them on either side. It then becomes necessary to make new parties to the proceeding in error by substituting for the deceased persons their legal representatives, or persons in privity with them. The Supreme Court thus points out the proper procedure in such cases: "We are of opinion that the proper practice in all cases where the record does not disclose the names of persons who should be made parties to the proceedings in error, is for the plaintiff in error or his attorney to file with the clerk of the court an affidavit, setting forth the names of all persons, so far as known, whose interests would be affected by the proceedings, or who are necessary

parties thereto. In addition to this affidavit a *precipe* should be filed directing the clerk to issue a *scire facias* to hear errors, directed to the persons therein named as defendants in error."¹

The affidavit above required should state (1) the full christian and surname of each person who it is intended shall be made a defendant in error; (2) where he resides or may be found, so that personal service of the *scire facias* may be made upon him; (3) the relation each such person bears to the action, as that he is a surviving heir, executor or administrator, etc., and (4) the reasons why such person or persons are necessary or proper parties to the writ of error. This affidavit, with the *precipe* indicated by the Supreme Court, should be filed with the court of review at the time of suing out the writ of error.

PROCEDURE BY DEFENDANT IN ERROR IF IMPROPER
PARTIES ARE JOINED OR NECESSARY PARTIES
OMITTED.

SEC. 70. The omission of necessary parties or the joinder of improper parties is held by the Supreme Court to be no ground for a motion to dismiss a writ of error. The defect lies in the *scire facias*, as the naming of the parties in the writ of error is merely for the purpose of identifying the record, a transcript of which is desired, while the *scire facias* is the process by which the defendants in error are brought

¹ Israel v. Arthur, 6 Colo. 85.

within the jurisdiction of the court, and no one can be affected by its determination of the cause in error, who is not made a party and subjected to the jurisdiction of the court by proper service of the *scire facias* on him.

When, therefore, necessary parties are not named in the *scire facias*, or the names of improper parties are inserted therein, the proper practice is to attack the *scire facias* by a motion to have the omitted parties made parties to the writ of error and their names inserted in the *scire facias*, or the proceeding in error dismissed as to the parties improperly made parties thereto. The Supreme Court thus points out the correct practice in such cases.

“If objection be made that proper parties to the proceeding in error have not been made, or that persons have been improperly joined, the names of such persons, together with the facts necessary to enable the court to pass upon the point, would have to appear in like authentic manner,” that is, by affidavit.¹

This motion, however, should not be made until it is ascertained by the *scire facias*, on its return, that it does not contain the names of the necessary parties, or contains the names of improper parties. The motion for misjoinder can only be made by the person, who is improperly made a party to the proceeding in error, as his improper joinder will not materially affect the interests of those who are proper

¹ Israel v. Arthur, 6 Colo. 85.

parties thereto, and such improper joinder is no sufficient ground of objection by any one, but the person who is not a proper party to the proceeding.

But where necessary parties are omitted, it seems that the parties made, and served, may raise the objection of want of parties, only when the joinder of the omitted parties is required to enable the court by adjudicating the rights of such parties to adjudicate and pass upon all the questions material to a complete determination of the cause in error. If the cause in error may be determined without prejudice to the rights of the omitted parties, or by saving their rights, the objection of want of proper parties will not be entertained by the court. It is a universal principle of jurisprudence that a court is without any authority to adjudicate the rights of parties who are not before it by the due and legal service of process.

The objection of "want of necessary or proper parties" is to be raised, at as early a period as possible, after the service and return the *scire facias*, by a motion in writing, filed with the clerk, and supported by an affidavit. The affidavit, which may be made by any person cognizant of the facts, must state the parties that have been omitted; where they reside or may be found; how they are necessary parties to the proceeding in error; their relation to the parties to the original action, either as legal representatives, or as in privity with them, and all facts in detail, sufficient to enable the court to pass upon the question under-

standingly. This is particularly necessary to enable the court to see whether the presence of the persons named, as parties, is indispensable to the proper adjudication of the essential questions raised by the proceeding in error. There would appear to be no objection to the filing of counter affidavits, if the motion is resisted, and the court would give leave to file them, when it finds them useful or necessary to the proper determination of the question. If, however, the affidavit in support of the motion be not full and complete, or defective in any material respect, a counter affidavit will be unnecessary.

The motion to make necessary parties may also be made by or on behalf of the omitted parties, by their asking to be permitted to come in as parties and be allowed to prosecute or defend, as their rights may require. In such case the omitted parties will enter a general appearance, and their names will be inserted in the record of the court of review in the cause in error.

If the motion be by the other parties to the record, and the court allows the motion, an order is made that an *alias scire facias* issue containing the names of the necessary parties, who had been omitted, and be served upon them at as early a day as possible.

If the court be satisfied that *the person objecting* to his being made a party is neither a necessary or proper party, it will order the proceeding dismissed as to him.

WHO PLAINTIFF IN ERROR.

SEC. 71. Under the Code a writ of error lies from the Supreme Court to *every* final judgment of a court of record. There is but one exception to this rule, made by the Court of Appeals Act of 1891, in a final judgment of a court of record, including the Court of Appeals, in cases where the amount of the judgment is twenty-five hundred dollars or less, or the value of the property in replevin is found to be of that value or less. Such cases are not subject to review by the Supreme Court.

Aside from this exception, any party to a judgment of a court of record, who claims that there is in such judgment reversible error to his prejudice, may have a writ of error to such judgment from either the Court of Appeals or the Supreme Court.

The writ of error issues of course on application to the clerk of the court of review, and payment of the docket fee. He is not required to procure an allowance of the writ of error by a judge of a court, as is the practice of the Federal Supreme Court, and the courts of some of the States, nor is he required to give bond for the payment of the costs of the proceedings, unless he be a non-resident of the State or within the provisions of the statute of "*Costs*" as amended in 1885. It does not matter whether he is a sole plaintiff or one of several plaintiffs, or a sole defendant or one of several defendants. If he feel

aggrieved by the judgment of the trial court, he may sue a writ of error out of the Court of Appeals, or in proper cases out of the Supreme Court. If the judgment is reviewable by the Supreme Court, under the Court of Appeals Act, a writ of error may in like manner be sued out of the Supreme Court to the judgment of that court.

If in the trial court he have been successful, but the judgment is not satisfactory to him, he may take a writ of error to such judgment. It is held that the only mode by which a successful plaintiff can procure a review of a judgment in his favor is by a proceeding in error, and that no appeal will lie in such cases.¹

PROCEDURE, WHEN ONE, WHO SHOULD BE A PLAINTIFF IN ERROR, REFUSES TO BE A PARTY TO THE PROCEEDINGS IN ERROR.

SEC. 72. It will sometimes happen that, where there is more than one person as a party on either side of the controversy, some one or more of such persons will refuse to participate in prosecuting the proceedings in error. At common law, if the proceedings in error were brought by the plaintiffs in the trial court, it was necessary for all the plaintiffs to unite in prosecuting the writ of error in the court of review; but if the proceedings in error were brought by the defendants in the trial court, all must either join in the

¹ Hall v. Payrock, etc., Co., 6 Colo. 81.

proceedings, or if any refused to be parties to the writ of error, the parties refusing must be summoned, and then be severed.

This rule of the common law has been abrogated in Colorado by the following provision of the Code:

“ In all cases, where a judgment or decree shall be rendered in any court of record, in any case whatever, either in law or in chancery, against two or more persons, either one of said persons shall be permitted to remove said suit to the Supreme Court, by appeal or writ of error, and for that purpose shall be permitted to use the names of all persons, if necessary; but no costs shall be taxed against any person who shall not join in said appeal or writ of error, and all such suits shall be determined in said Supreme Court as other suits are, and in the same manner as if all the parties had joined in the appeal or writ of error.¹

By virtue of this provision the plaintiff in error is enabled to bring all proper parties before the court, notwithstanding any unwillingness to join in the proceeding on the part of any one, and thus enable the court of review to pass upon the proceedings had in the trial court, which it will not do unless all parties who may be materially affected by its decision are before it.

When this section of the Code is availed of, it is proper for the plaintiff in error to point out in his *precipe*, or in some other suitable manner, who of the

¹ Code, § 406.

plaintiffs in error on the record of the court of review refuse to join in prosecuting the proceedings in error, that the clerk may be advised what parties named on the record are not to be taxed with costs.

WHEN A WRIT OF ERROR WILL LIE.

SEC. 73. At common law a writ of error lies only to *final* judgments, which have been rendered in actions that are prosecuted according to the course of the common law. If the proceeding is a summary one or not according to the course of the common law, no writ of error will lie to the final judgment therein. So suits and proceedings in a court of equity are reviewable only by *appeal* from the chancellor's decree, and not by writ of error. But these rules of procedure have been changed by the Code, and under its provisions *all final judgments*, whether in common law or equitable actions, may be reviewed either by appeal or by writ of error. The Code provides, that :

“Writs of error shall lie from the Supreme Court to *every* final judgment of any court of record of this State.”

This Code provision is made applicable also to the Court of Appeals by the Court of Appeals Act of 1891.

The provision is a broad one, the word “every” including *all* final judgments which may be rendered by a trial court of record, acting under the authority of the State of Colorado. Hence, unlike the pro-

cedure in many States, in Colorado, the writ of error is not confined in its operation to the cases of final judgments, rendered in actions at law, as distinguished from equitable actions and summary or statutory proceedings. If the trial court have the right, in the exercise either of its common-law jurisdiction, or of its chancery powers, or of a summary or special statutory jurisdiction, to render a judgment, finally adjudicating on and determining the rights of the parties thereto before it, such a judgment will be subject to review in one of the courts of review by a writ of error. The distinction in the mode of procedure, in the review of cases at law and suits in equity, which existed prior to the adoption of the Code, no longer has a standing in Colorado procedure.

The indispensable requisites, which entitle a party to any action or proceeding, had in a trial court of record of the State, who deems himself aggrieved by the judgment of such court, to sue out a writ of error from the proper court of review to such judgment, are:

First, that the judgment be that of a court of record, acting under the laws of the State. Hence in Colorado no writ of error lies from any court except the Court of Appeals or the Supreme Court. The District Court has no authority to issue a writ of error to any inferior court, as is the practice of many Code States; and the two courts of review have no authority to issue a writ of error to the judgment of

any other court, unless such court be a court of record, which acts under the authority of the State.

Second, that the judgment sought to be reviewed have finally adjudicated all the material issues necessary to the proper determination of the questions involved, and leaves nothing to be done by the trial court, except to execute or enforce its judgment.

Third, that the said judgment be one, which the court out of which the writ issued has jurisdiction under the laws of the State to review.

Fourth, that the party suing out the writ of error claims to be aggrieved by such judgment.

It is not essential that such judgment be a *valid* judgment on its face. If the transcript of the record filed in the court of review carries on its face a *final* adjudication of the matters litigated therein between the parties, although on its face it may show a want of essentials to a valid judgment, a writ of error will lie to reverse it.¹

In the case then under review by the Supreme Court on writ of error to the County Court of Las Animas county, the record filed in the Supreme Court was defective, in that it showed *no* PLACITA, by which the presence of the judge and other officers of the court was made to appear. The placita was held to be indispensable to the record, and as the Supreme Court presumes that the transcript filed in the appel-

¹ Skinner v. Beshoar, 2 Colo. 283.

late court is a true copy and transcript of the record as it exists in the trial court, though the court held the judgment to be void on its face, yet it held that it was reviewable on writ of error.

This doctrine that a writ of error lies only to *final* judgments has frequent illustrations in the decisions of the Supreme Court of Illinois, as well as the decisions cited of the Supreme Court of Colorado, below referred to.¹

It is there held, however, that no writ of error lies to a judgment rendered by the court when the plaintiff takes a voluntary nonsuit, though such nonsuit is with a right to apply to the court to set it aside, and the trial court on application refuses to set the nonsuit aside.

So no writ of error will lie to a decree which is entered by consent of parties.²

So it is held in Illinois that a writ of error will not lie from the Supreme Court to a judgment of the appellate court, which merely reverses the judgment of the trial court and remands it for further proceedings in the trial court.

This ruling, it seems, will be good in a similar case under the Court of Appeals Act of Colorado, such a decision of the court not being a final judg-

¹Moody v. Peake, 13 Ill. 343; Keel v. Bentley, 15 Ill. 225; Walker v. Oliver, 63 Ill. 199; Phelps v. Ficks, 63 Ill. 201; Williams v. La Valle, 64 Ill. 110; *Ex parte* Thompson, 93 Ill. 89.

²Barnes v. Barber, 1 Gilm. 401; Lombard v. Cheever, 3 Gilm. 470; Rankins v. Curtenius, 12 Ill. 336; Brown v. Malledy, 19 Ill. 290; Armstrong v. Cooper, 11 Ill. 540.

ment within the intent of the section of the Code above cited.¹

A writ of error may be brought by a plaintiff to reverse a judgment rendered by the trial court in his favor, if he deem it erroneous.²

A party may bring a writ of error to reverse a judgment against him, notwithstanding he has paid the judgment, since his payment will be under legal compulsion and not voluntary, if such judgment might have been enforced by execution or other compulsory process.³

A writ of error lies to the decision of the trial court overruling a motion to set aside a judgment of that court, and refusing to quash an execution issued thereon.⁴

Although the plaintiff has taken a voluntary non-suit as to one of the defendants in an action *ex delicto*, he is not thereby precluded from prosecuting a writ of error to the judgment of the trial court, which discharges one or more of the other defendants in such suit, either on the pleadings or on the evidence.

A writ of error does not lie to an order setting aside the judgment and granting a new trial, under the statute, this not being a final judgment on the merits.

¹ Anderson v. Fruitt, 108 Ill. 378; Rogers v. Traver, 115 Ill. 113.

² 2 Tidd's Pr. 1134; Johnson v. Gibbs, 2 Burr. 1772; Teal v. Russell, 2 Scam. 321; Jones v. Wight, 4 Scam. 338; Davidson, Admr., v. Bond, 12 Ill. 84; Fuller v. Robb, 26 Ill. 246; Thayer v. Finley, 36 Ill. 262; Hall v. Pay Rock Co., 6 Colo. 81; Bernard v. Boggs, 4 Colo. 73.

³ Richeson v. Ryan, 14 Ill. 74.

⁴ Sloo v. Bank, 1 Scam. 428.

So a writ of error does not lie to hear exceptions to a judgment which has been reversed in the court of review, and stands for a new trial or hearing in the trial court.¹

A writ of error does not lie on behalf of the people of the State to review the final judgment of a District Court in a prosecution for a criminal offense.²

This rule, it seems, is applicable to judgments of the Court of Appeals, though all judgments of that court are reviewable by the Supreme Court in criminal cases. The question is now pending in the case of *People v. Hadley et al.*, commonly known as the Boodlers' case, wherein the Court of Appeals reversed the judgment of the District Court of Arapahoe county, convicting the defendants of forgery, holding the offense proved not to be forgery, and remanded the case to the District Court for further proceedings by that court. To the judgment of the Court of Appeals the People sued out a writ of error from the Supreme Court, and Justice Elliott in vacation ordered the writ to be made a *supersedeas*. The case is now pending and will determine the important question whether a writ of error will lie to a judgment of the Court of Appeals on behalf of the People in a criminal case.

¹ *Barnes v. Barber*, 1 Gilm. 401; *Williams v. La Vallee*, 64 Ill. 110; *Rankin v. Ballance*, 13 Ill. 706.

² *People v. Royal*, 1 Scam. 557; *People v. Dill*, 1 Scam. 257; *People v. Ingraham*, 1 Scam. 556.

A SEPARATE WRIT OF ERROR DOES NOT LIE TO PROCEEDINGS IN THE ACTION WHICH OCCUR SUBSEQUENT TO THE RENDITION OF THE FINAL JUDGMENT.

SEC. 74. Prior to the amendment to the Code of 1889, proceedings in an action, had in the trial court, after the rendition of the final judgment therein, were not reviewable on a writ of error, except such proceedings as occurred in the awarding of execution of such judgment.¹ But by that amendment a court of review is now empowered to review all proceedings which may be had, and orders made therein, subsequent to the rendition of the final judgment, in like manner and with like effect as it may review orders and proceedings in the action, which occur during its pendency, and prior to the final judgment therein. This would seem to include orders in proceedings supplementary to execution, orders allowing or denying motions to vacate a judgment, and allow a defendant to come in and defend on the merits, and numerous other orders, which may be applied for and allowed or denied in exercise of the court's inherent power to control and enforce its judgments.

The amendments of 1889 are held by the Supreme Court not to abrogate the former practice of the court, and authorize a new and independent writ of error in all cases of orders made after judgment, which, it is alleged, are erroneous. There are various classes of cases, some of which relate to errors com-

¹ Polk v. Butterfield, 9 Colo. 325; Cross v. Moffatt, 11 Colo. 210.

mitted in proceedings had during the pendency of the action, which errors, by mistake or misprision of the clerk in entering the proper orders, do not appear by the transcript of the record, and an application is made to the trial court for the correction of its record, and the trial court declines to order the desired correction. In such case, the original cause being in the Supreme Court for review, the action of the trial court in refusing to make the desired correction may be reviewed by the Supreme Court on a supplemental transcript to the original transcript already filed therein.¹

If, however, the proceeding after judgment be one, such as a refusal to quash an execution for substantive defects appearing on the face of the writ or the refusal or allowance of a motion to vacate a judgment on the ground of mistake, surprise, accident, or excusable negligence, or orders made or denied in supplementary proceedings and other similar cases, wherein the sole errors complained of occur in the proceedings after judgment, and no error of any kind whatever is alleged to have occurred in the proceedings before judgment, it would *seem unnecessary* to take to the court of review a complete transcript of the original record, and that the true intent of the amendment is to allow a separate writ of error to such subsequent proceedings, when the original proceedings are in no manner attacked or called in

¹ Pleyte v. Pleyte, 14 Colo. 593.

question. This point is not adjudicated by the case above referred to, as we understand it, and no adjudication directly in point has as yet been made by either of the courts of review.

WRIT OF ERROR — STATUTE OF LIMITATIONS AS TO.

SEC. 75. "A writ of error in civil cases shall not be sued out after the expiration of *three* years from the rendition of the judgment or decree complained of. But when a person who thinks himself aggrieved by a judgment or decree, which is reviewable in a court of review, shall be an infant, *non compos mentis*, or imprisoned, at the time the same was rendered, the time of such disability shall be excluded from the time of such three years."¹

The time given by the Code of 1883 was *five* years, instead of the *three* years now given by the Code of 1887.

Statutes which limit the time within which a cause may be taken to a court of review are in the nature of statutes of repose, and when the time thereby limited has expired, the right to have the judgment undisturbed by a review thereof in a court of review becomes a vested right in the party in whose favor the limitation exists, and no subsequent legislation can affect such right to his injury.²

Practitioners will note that a married woman is not, in Colorado, exempt from the operation of the

¹ Code, § 401.

² Willoughby v. George, 5 Colo. 80; Clayton v. Cheely, 5 Colo. 337.

statute of limitations, as she is in other States. This arises from the Married Woman's Act of the State, which places a married woman on the same footing as to her liabilities and rights as if she were sole and unmarried. Hence in civil cases the disability of coverture does not exist in Colorado, though the rule is otherwise in criminal cases. An *infant* in Colorado is a male, who has not yet attained his twenty-first year, and a female who has not attained her eighteenth year. The *three* years' limitation begins to run on the day next succeeding that on which he or she attains his or her majority, and the writ of error must be sued out within *three* years from that day.

So, if the party be *non compos mentis* on the day on which the judgment is rendered, the writ of error must be sued out within *three* years from the day of his restoration to reason.

So, if the party be in prison at the date of the rendition of the judgment, the *three* years within which the writ of error proceeding must be brought, dates from the day of his discharge from the imprisonment.

In connection with this matter of the statute of limitations arises the question, whether section 2917 of Mills' Ann. Statutes is applicable to the suing out of a writ of error. It authorizes the commencement of a new action, under certain circumstances, where the original action abates by operation of law, in the trial courts, within the additional period of

one year to that allowed by the statute of limitations, and as a proceeding by writ of error is a new action, it would seem that where a writ of error has been sued out within the three years from the final judgment in the action, and is abated, or avoided or defeated for any one of the causes mentioned in that section, and the time within which such writ of error can ordinarily be sued out has expired, the section will be applicable. No case, under such section, has as yet arisen in the courts of review and reached a decision. The question can only arise by an attempt to bring a writ of error in one of the courts of review, under the provisions of that section, after the expiration of the three years' limitation.

In criminal cases there does not appear to be, by statute, any limitation to the time within which a writ of error to reverse a conviction for a crime may be brought. This, probably, arises from the fact that a writ of error in criminal cases is a writ of right, and is, usually, sued out very promptly by a person convicted of any crime, if he believes that he may possibly set aside the conviction. Another reason is that no lapse of time ought to prevent a review and reversal of an unjust conviction of crime.

PROCEDURE TO PROCURE A WRIT OF ERROR.

SEC. 76. Usually the party who desires to sue out a writ of error, instead of applying to the clerk of the court of review in the first instance for such writ

to issue, and having it served on the clerk of the trial court, procures from the latter a transcript of the record of the action or proceeding, which he desires to have reviewed by the appellate court, and files the same in the office of the clerk of the court of review. This mode of procedure saves the cost of service of the writ of error on the clerk of the trial court, is more convenient, for parties and attorneys, in cases determined in courts, which are distant from the seat of government where the courts of review sit, and gives the attorney for the plaintiff in error an opportunity to ascertain the correct names of all parties to the record in the trial court.

When this procedure is followed, the rules of the Supreme Court provide that: "Where a transcript of the record, duly certified to be full and complete, has been filed in the office of the clerk of this court, before the issuance of a writ of error, it shall not be necessary, except in cases where a *supersedeas* may be allowed, to deliver such writ to the clerk of the inferior court; but the same may be filed in the office of the clerk of this court, and such transcript, so filed with the clerk of this court, shall be taken and considered to be a due return to said writ of error."

This procedure is the one usually followed in criminal cases, as the object in all such cases is to procure a *supersedeas*. See "Error in Criminal Cases," *post*.

WRIT OF ERROR — CONTENTS.

SEC. 77. A writ of error runs in the name of the people of the State of Colorado, as prescribed by the Constitution; is issued out of the court of review; bears teste in the name of the chief justice of the court of review; is signed by the clerk of such court and sealed with its seal, and is directed to the clerk of the trial court in which the action or proceeding was had, which it is sought to have reviewed.¹

THE ISSUANCE OF THE WRIT OF ERROR IS NECESSARY TO GIVE THE COURT OF REVIEW JURISDICTION.

SEC. 78. The Supreme Court has repeatedly held that, in prosecuting proceedings in error, it is indispensable that a writ of error be issued, and unless it is issued, that the court of review will have no jurisdiction of the cause. Parties cannot confer jurisdiction of the subject-matter by stipulation or consent, nor can the court of review review the record of a trial court on a certified transcript thereof, until a writ of error has been issued in the particular cause. The appellate court derives its jurisdiction over the subject-matter from the law, and no law confers jurisdiction in such case. This, however, applies only to cases which are within its appellate juris-

¹ Const., art. VI, § 30; Mills' Stat., chap. 35, § 970; rule 1, Supreme Court.

diction only. In cases which are within the original jurisdiction of the Supreme Court, though brought before the court by appeal or writ of error in the first instance, if the parties agree thereto, by submitting the cause to the court, as an "agreed case," for its adjudication, the Supreme Court will have jurisdiction to hear and determine it without a previous issuance of the writ of error.¹

WRIT OF ERROR — HOW SERVED.

SEC. 79. As hereinbefore stated (*ante*, § 76) the writ of error, though it is always issued by the clerk, is in many instances not served on the clerk of the trial court. But there are cases in which actual service thereof is indispensable. As no statute prescribes the mode of service, the common-law mode of serving it, by reading, is that which is necessary. But the better mode is to have the writ issued in duplicate, read the original to the clerk and deliver to him the duplicate; then return to the office of the clerk of the court of review the original with a certificate of the service indorsed thereon. If the transcript has not been already delivered to the plaintiff's attorney, the clerk, when transmitting the transcript of the record, will accompany it with the copy of the writ of error, delivered to him, with the following indorsement thereon:

¹ *People v. Boughton*, 5 Colo. 487.

"In obedience to the command of the within writ of error, I do hereby transmit a true and complete copy of the record in the cause, in said writ mentioned, with the original bill of exceptions therein filed, as designated by the attorney for the plaintiff in error, by his precipe duly filed in my office.

"Witness my hand and the seal of the — Court of — county, Colorado, at my office in said county, this — day of —, 18—.

Clerk.

When a *supersedeas* is allowed, the writ of error must be served on the clerk of the trial court, that he may not issue process in execution of the judgment, and if process have been already issued, that he may recall the same. In cases of a *supersedeas*, the necessity of a duplicate writ of error is apparent, as the clerk of the trial court ought to file the copy of the writ, with the indorsement of the *supersedeas* thereon, in his office, so that the fact of the *supersedeas* having been granted, may always appear by the files of the cause.

When an execution or other process for the enforcement of the judgment has been issued from the trial court, and is in the hands of the proper sheriff or other proper officer for execution, the writ of error may be served on the clerk of the trial court, who will thereupon forthwith recall the same, or it may be served, under a rule of the Supreme Court, on the officer in whose hands it may have been placed for execution. Such service is made by delivering to such officer a copy of the writ of error, and of the

indorsement thereon, making the same a *supersedeas*, with a certificate of the clerk of the court of review, or of the trial court, to which the writ of error is directed, that the copy served is a true and correct copy of the writ of error and of the indorsements thereon.¹

In criminal cases, the punishment of which is imprisonment in the penitentiary, if the convict have been committed to the State prison, the *supersedeas* will be served on the warden; if he be yet in custody of the sheriff it will be served on the sheriff, in whose custody he is.

SUPERSEDEAS—HOW PROCURED.

SEC. 80. At common law the defendant, against whom a judgment was rendered in a court of record in a civil action, was entitled to have a writ of error issued as a matter of right. The writ when issued stayed all further proceedings on the judgment, until the decision was had on such writ of error. The plaintiff in the writ was not required to give security that he would satisfy the judgment, if he failed in his suit in error. This was the practice prior to the third year of James the First, when it was changed in this respect, and the plaintiff in error was thereafter required, if he sought to stay the execution of the judgment, to give bond conditioned for the satisfac-

¹ Rule 6 of Supreme Court.

tion of such judgment, in case he failed to reverse the same on error.

This common-law requirement is in force in Colorado by virtue of a provision of the Code, which is as follows:

"No writ of error shall operate as a *supersedeas* unless the Supreme Court, or, if application be made therefor in vacation, some justice of the Supreme Court, after inspecting a copy of the record in the cause, shall order such writ to be made a *supersedeas*, nor until the party applying therefor shall file a bond in the office of the clerk of the Supreme Court, with the conditions required in cases of appeals, approved by the court or justice allowing such order for *supersedeas*, or if such order shall so direct, by the clerk of some court of record. The clerk issuing such writ of error shall indorse thereon that it shall be a *supersedeas*, and operate accordingly."¹

This provision applies only to civil cases. In criminal cases, the writ of error and *supersedeas* are not governed by the Code, but by sections 1478 and 1479 of Mills' Statutes as part of the Criminal Code. Those sections are practically a re-enactment of the common-law rule, as it existed subsequent to the reign of James the First, and by statute made to apply to criminal cases.

By statute also the writ of error in all cases, not capital, is a writ of right, and issues as of course,

¹ Code, § 402.

but does not stay the execution of the sentence, unless superseded as is prescribed by the statute.

PROCEDURE TO OBTAIN A SUPERSEDEAS.

SEC. 81. The applicant for a *supersedeas* on a writ of error, in both civil and criminal cases, must, at the time of making such application, *first* file the transcript of the record on which the application is made, with an assignment of errors thereon written, or appended thereto, which transcript must be certified by the clerk of the trial court to be complete.¹ No formal motion in writing is prescribed by the rules, but it is the better practice to make a formal written application and point out *in it* specifically the errors which are assigned, that are deemed by the applicant of sufficient importance to justify a *supersedeas*. By so doing he will bring those specific errors to the attention of the court, or justice, to whom the application is made, and secure a more particular examination by him of the record in relation to those errors as grounds for allowing a *supersedeas*. The court or justice will not usually require a brief or written argument in support of the application, though a brief and argument may be advisable in many cases. The court or justice will then take the record for examination on two points only, the one, whether the specific errors assigned are found in the record; the other, whether the errors found are of

¹ Rule 4 of Supreme Court.

sufficient importance, *prima facie*, to warrant the granting of the *supersedeas*.

In making such examination the court or justice does not enter into a detailed examination, such as it does when it passes upon the whole record for final hearing.

If, upon such examination, the court or justice is of opinion that a *supersedeas* may be granted, an order is then entered, allowing such *supersedeas*, prescribing the penalty of the bond to be given by the applicant and designating by whom the same may be approved. The plaintiff in error must then prepare his *supersedeas* bond in the sum required by the order and present it to the person designated for approval. It can be approved by no other person, unless it be by the court or a justice thereof, or by some other person designated by them by a subsequent order made for that purpose.

It is not unusual for the courts of review when allowing a *supersedeas* to direct that the bond be approved by the clerk of the trial court, or by a clerk of a District Court or a County Court of the county in which the plaintiff in error or his sureties reside. By making such order the court enables a plaintiff in error to give adequate security from among his friends in the county of his residence, when he resides in a distant county of the State, which he might be unable to give, if it required the security to be approved by the clerk of the court

of review, or one of its justices. It is also a matter of prudence that the sureties be approved by the clerk of some court, at or near the residence of the sureties as the justices and clerks of the appellate courts would in many instances be unable to satisfy themselves as to the responsibility of the persons offered as sureties in cases where they are residents of distant counties of the State.

The clerk who is designated to approve the bond is required "to use due diligence in ascertaining the responsibility of the person becoming surety, and to require each of the sureties to accompany the same with an affidavit that he is worth the sum specified in the undertaking, over and above his just debts and liabilities, in property not exempted by law from execution. Provided, that when the amount specified in the undertaking exceeds one thousand dollars and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to the sum specified in the undertaking."¹

When the bond is properly executed and approved, it is then to be delivered to the clerk of the court of review, to be by him filed with the other papers in the cause. It has been held by the Supreme Court of Illinois, that if the bond be merely "lodged" in the office of the clerk, but not indorsed "filed," it is

¹ Code, § 421.

not a part of the record. But courts now generally hold, that if the paper be delivered to the clerk for the purpose of being made a part of the files of the cause, the clerk being notified of the purpose for which it is placed in his custody, such deposit will be held to be a *filing*, within the intent of the law. The indorsement is held to be merely evidence of the time at which it was filed.¹ It has been held in one case in Minnesota that the delivery to the clerk must be at the clerk's office, and that a delivery to him at any other place does not impose on him the duty of carrying it to his office and there filing it.²

Where the bond is ordered to be approved by the clerk of a District or County Court, the court will take judicial notice of the signature of such clerk, and no proof of his official character is required, unless it be questioned by affidavit, showing that the person who approved the bond was not, at the time of approving the same, the clerk of such court, or his authorized deputy.

The clerk upon filing the bond will then indorse on the writ of error the following words :

"A transcript of the record in this cause having been filed in my office, with an order indorsed thereon that the writ of error herein be made a *supersedeas*

¹ Eldred v. Malloy, 2 Colo. 21.

² Bouvier Law Dict., art. "File;" Read v. Acton, 120 Mass. 130; Hamilton v. Beardslee, 51 Ill. 478; Tregambo v. Mining Co., 57 Cal. 506; Gorham v. Summers, 25 Minn. 81; Appleton Mill Co. v. Warder *et al.* (Minn.), 43 N. W. R. 791.

according to law, this writ of error is, therefore, made a *supersedeas* and shall operate accordingly," which indorsement is then signed by such clerk, and the writ then delivered to the plaintiff in error or his attorney, for the purpose of having it properly served. The same indorsement is made in both civil and criminal cases, when a *supersedeas* is ordered.

FORM OF SUPERSEDEAS BOND.

SEC. 82.] *Know all men by these presents, that we —, as principal, and — as surety, all of the county of —, in the State of Colorado, are held and firmly bound unto — of the county of —, in the State aforesaid, in the penal sum of — dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.*

Witness our hands and seals, this — day of —, A. D. 18—.

The condition of the above obligation is such that whereas the above bounden — did on the — day of —, A. D. 18—, sue out of the — (here give title of the court of review), a writ of error to the — Court of the county of —, in the State of Colorado, to remove therefrom the record of said court, in a certain action lately pending and now determined in said court, in which — was the plaintiff, and — was the defendant, for review by the said — (name of court of review).

And whereas an order has been made by said court making said writ of error a supersedeas upon the plaintiff in error executing a good and sufficient bond in the sum of — dollars with securities to be approved by —:

Now, therefore, if the above bounden — shall prosecute his said writ of error with effect and shall pay said judgment with costs, in-

*terest and damages, in case the judgment be affirmed, then the above obligation to be void, otherwise to remain in full force and effect.*¹

— — [SEAL.]

— — [SEAL.]

Approved by me this — day of —, A. D. 18—.

On the bond should be indorsed the affidavit of justification of the sureties, as prescribed by Code, § 421.

EFFECT OF SUPERSEDEAS.

SEC. 83. The effect of the approval and filing of the *supersedeas* bond is the same as that of filing an approved appeal bond. It authorizes the issuance of the *supersedeas* order, the effect of which is to stay all further proceedings in execution of the judgment or decree superseded, and to leave the proceedings in the same state in which they are found at the time when the *supersedeas* is served on the clerk of the trial court, or on the officer who has process for the execution of the judgment superseded. It stays all further action of the court or officer from the point of time at which the *supersedeas* is actually served. It does not, however, affect any action had by the court, previously, in the proceedings or judgment, nor does it at all prevent the action of the court, in amending or correcting its record, or any other action proper in the cause,

¹ In criminal cases the condition of the bond is different. See Mills' Ann. Stats., § 1479. It must be as prescribed in that section, for his appearance to abide by any final order made by the court of review in his case.

which is not in furtherance of the execution of the judgment. Thus, if an execution have been issued on the judgment and a levy duly made on real or personal property thereunder, the *supersedeas* does not vacate such levy, but the officer can take no further steps to enforce the execution, though the levy will remain in full force as a lien, until the judgment is vacated in the proceeding in error. He must stop all proceedings to actively enforce such execution at the point of time at which he is served with the *supersedeas*.

So if the judgment of the trial court have been filed, in conformity with the statute, as a lien on the real estate of the judgment debtor, such lien remains in full force, and is neither vacated nor suspended in its effect as a lien by the *supersedeas*. So an attachment lien, if one have been obtained prior to or during the pendency of the action, is not released thereby. If an injunction be allowed by the final order or decree, such injunction is not suspended in its operation or vacated by the *supersedeas*. So if an injunction have been dissolved in the action, the *supersedeas* will not revive it, or put it again into effect. It has no effect whatever except to preserve all things in *statu quo*, as they are at the time of its service, and prevent further steps from being taken to enforce the judgment, until the final judgment on the writ of error.¹

¹ Hurd v. People, 14 Colo. 210.

RETURN ON WRIT OF ERROR, WHEN MADE A SUPERSEDEAS.

SEC. 84. By rule of the Supreme Court, when a writ of error, which has been made a *supersedeas*, is served on the clerk of the trial court, he shall return on it, that "the same has been served on him, and that it appears by the indorsement thereon that a transcript of the record has been filed in the office of the clerk of the ——— court."

When the *supersedeas* is served on the officer, who has in his hands for execution final process issued out of the trial court on such judgment, he shall discontinue all further proceedings on such process, and shall return such process into the court out of which it issued, together with a copy of the writ of error, which was served on him, and he shall set forth in his return on such final process what, if any thing, he has done in obedience thereto. Hence, if he have made a levy on property, real or personal, under such final process, he must state the fact of such levy and all other proceedings had by him unto the time of service of the *supersedeas*.¹

SUPERSEDEAS — WHEN APPEAL DISMISSED "WITHOUT PREJUDICE."

SEC. 85. Prior to the Code of 1887 the dismissal of a writ of error, or of an appeal, operated, without regard to the ground upon which such dismissal was

¹ Rule 6 of Supreme Court.

ordered, to only a *nonsuit* on the writ of error, and a *discontinuance* of the appeal, unless the judgment of the trial court was expressly affirmed.¹

But by the Code of 1887 the dismissal in the court of review of either an appeal or a writ of error becomes an affirmance of the judgment of the trial court, and precludes another writ of error on the same judgment, though it be brought within the statute of limitations, unless at the time of dismissing such appeal or writ of error the dismissal is expressly declared by the order of the court to be "without prejudice to another writ of error." If the order of dismissal do not so recite, the dismissal, whether it be by the plaintiff in error or the appellant, or by the court on motion of an adverse party, is an affirmance of the judgment of the trial court.

When the appeal or writ of error is dismissed "without prejudice," the same party who took the appeal or writ of error, which is so dismissed, may sue out a new writ of error on the same judgment at any time within three years from the rendition of the judgment complained of. This will apply to a writ of error sued out of the Court of Appeals, as well as the Supreme Court, but it is doubtful if it will apply to a judgment rendered by the Court of Appeals, from which an appeal or a writ of error from the Supreme Court lies. If applicable, the new writ of error must be sued out within sixty days from the

¹ Freas v. Englebrecht, 3 Colo. 377; Monti v. Bishop, 3 Colo. 605.

date of the original judgment of the Court of Appeals.

But if the plaintiff in error, whose appeal or writ of error has been dismissed "without prejudice," does not, within thirty days from the date of the dismissal of his appeal or writ of error, procure from the court of review a *supersedeas* of the original judgment on his new writ of error, the securities on his appeal bond become liable in the same manner as if the judgment of the trial court had been affirmed on the dismissed appeal. It is not forbidden to sue out a new writ of error at any time within the statute of limitations, by this provision, but the court of review is inhibited from granting a *supersedeas* on such new writ of error, unless it be granted within thirty days from the date of the dismissal of the original appeal. There is, however, nothing in the provision which deprives the court of review of the right to review the judgment of the trial court at any time within the statute of limitations.

The practitioner should, therefore, be careful: First, when he asks a dismissal of his appeal or writ of error, by reason of some error or defect which is not fatal, to ask that the record entry show that the appeal or writ of error is dismissed without prejudice. "This should be done at the time of the dismissal, as it is doubtful whether the court has power to make such an order at any subsequent time, though, if the application to dismiss "without prejudice" is

made and the clerk inadvertently omit to make the proper record entry the court will order such entry to be made *nunc pro tunc*.

If the dismissal is made on motion of the adverse party, because a writ of error does not lie, or because the writ has been issued after the time prescribed by the statute of limitations, an order of dismissal without prejudice cannot avail, and will not be made.

Second. The applicant for a *supersedeas* must make his application to the court or justice before the expiration of thirty days from the date of the order of dismissal of the appeal. If the application be made in time, the order may be made by the court or justice after that time, as of the date of the application.¹

It may happen that an appeal is allowed by the trial court to the Supreme Court, in a case where the right of appeal to the Supreme Court is in doubt, and on motion in the Supreme Court it determines that it has not jurisdiction of the appeal, and dismisses the same, because the Court of Appeals is the court to which the appeal lies. In such case the appellant ought to ask that his appeal be dismissed "without prejudice to his right to a writ of error from the Court of Appeals." This would not be a case of an absolute dismissal because the writ of error does not lie to the judgment, but because the appeal has been taken to the wrong court, and the party ought in

¹ Code, § 397 ; *McMichaels v. Groves*, 14 Colo. 540.

justice to be permitted to sue out the writ of error from the proper court.

The *supersedeas* order of the court or justice, if made in vacation, is usually attached to the transcript of the record of the case which has been deposited in the office of the clerk of the court of review. The order is drawn by the justice of the court, and all indorsements are made by the clerk. With the preparation of them the attorney has no concern, except to see that they are in proper form, and in compliance with the requirements of the rules of the court. Hence we give no forms of such indorsements herein.

If an appeal or writ of error be dismissed, and no "without prejudice" condition be attached thereto, by the Court of Appeals, the party seems to be without remedy, if the judgment be not one that is reviewable on writ of error by the Supreme Court, as such judgment is an affirmance of the original judgment of the trial court. It may be, however, if prompt application be made to the Court of Appeals, and a strong showing of merits is made, that the Court of Appeals will modify its order of dismissal. But this is purely discretionary with it.

CHAPTER IV.

Of the Record.

- SEC. 86. Record — what constitutes the.
87. Modifications made by the Code.
88. Record necessary on writ of error.
89. Of the transcript of the record.
90. *Precipe* for transcript ; form.
91. Transcript, form of.
92. Procedure when record is defective.
93. When record to be filed on appeal.

RECORD, WHAT CONSTITUTES THE.

SEC. 86. The *record* of the trial court is a memorial in writing, made by or under the direction and supervision of its clerk, of all its proceedings and the orders made in each particular action or proceeding pending therein.

The record, at common law, consists only of : First. The process by which the action or proceeding is commenced, and the return of service on the defendant therein named. Second. The pleadings of the respective parties to the actions. Third. The verdict of the jury, when the cause was tried by a jury. Fourth. The several orders made and entered of record, at the various times when the cause was before the court for consideration ; and Fifth, the *final* judgment rendered by the court in the action.

The record entry of the "*final judgment*" must not only show that the court made a *final* adjudication of all the material issues in the litigation, but it must also be apparent that the entry is intended as the entry of a "final judgment" in the action or proceeding.¹

All other matters occurring during the progress of the cause from its inception, by the issuance of the summons or other process to bring the defendant into court, to the final judgment, such as papers filed, motions made and decided, with the rulings of the court thereon, objections to the admission, competency or relevancy of evidence, objections to the admission of evidence or to its exclusion, objections to instructions given or to their modification or refusal to give, and every matter not necessarily a part of the record proper, can only be made a part of the record by being incorporated in a bill of exceptions, duly signed and sealed by the judge who tried the cause.²

The Code requires that the summons and pleadings and all petitions, motions, orders and other papers pertaining to or filed in the cause, be delivered to the clerk of the proper court, be by him filed on the day of their receipt by him and then be firmly attached together. This is done so as to prevent

¹ *Alvord et al. v. McGaughey*, 5 Colo. 244; *Stevens v. Printing Co.*, 7 Colo. 86.

² *Anderson v. Sloan*, 1 Colo. 33; *Filley v. Cody*, 4 Colo. 542; *Wike v. Campbell*, 5 Colo. 126.

any paper filed from being lost or misplaced. Such has always been the practice in both civil and criminal cases.

The clerk further keeps a record, in a well-bound book, of all orders made by the court in each case each day that the court sits for the transaction of judicial business, when its judicial action is invoked by one of the parties, by motion or otherwise, in the particular case. This book is termed "The Journal."

The journal of each day's proceedings, as it is entered of record, must show, at its head, on the first day of each term, *the placita* or convening order of the court. *The placita* should show that the court was convened on the day and at the place prescribed by law for such court; that the judge of that court, or some judge who is lawfully empowered to hold that court, was present and presiding therein; that the clerk of such court was present in person or by some authorized deputy, and that the sheriff of the county in which the court is held was also present, either in person or by an authorized deputy. In courts which exercise a jurisdiction to hear and try informations and indictments for criminal offenses, it is also customary to state that the district attorney of the proper district, or his deputy, is also present.

The *placita* is indispensable to the record, and its absence will be a ground for a reversal of the judgment of the trial court.¹

¹ Skinner v. Beshoar, 2 Colo. 383.

On every day subsequent to the first day on which the court judicially sits, the *placita* is usually in the following form :

“ Court convened pursuant to adjournment. Same officers present as on yesterday.”

At the close of each day's proceedings the order adjourning the court and the time to which it is adjourned are entered on the journal. At the close of the term the order entered is usually entered thus :

“ Ordered, that the court do now stand adjourned to court in course.”

In some districts it is the practice for the clerk of the court, at the opening of the court each day, to read the journal entries of the preceding day's proceedings, so that the attorneys interested may suggest necessary corrections and amendments therein. This practice obviates the necessity for applying to the court at some future time to correct erroneous entries or supply omissions in the record, and is to be commended. The record, after being thus read and the necessary corrections made, is in many districts then signed by the judge. In other districts the judge only signs the record at the close of each term of the court. The journal entries thus made, and the papers filed constitute the record of the court, when such papers are embodied in a bill of exceptions, duly signed and sealed.

The record, which the appellant or plaintiff in error must file in the court of review, is a transcript

of this record, as it exists in the trial court, at common law, which must be certified to be full, correct and complete, under the hand and seal of the clerk of the trial court. This is particularly so in criminal cases, as no law has in any way changed the contents of the record, as it is at common law, in that class of cases, nor does the Code provision, authorizing the original bill of exceptions to be taken to the court of review, apply to any but civil cases. Hence, in criminal cases, the bill of exceptions must be transcribed, and the original retained in the trial court.

MODIFICATIONS MADE BY THE CODE IN THE CONTENTS OF THE RECORD.

SEC. 87. The Code of 1887 has modified the common-law rule as to what shall constitute the record proper, in civil cases only, and has made to constitute a part of the record proper many things which, under the common-law rule, could have been incorporated into the same only by being embodied in a bill of exceptions.

Thus it provides that:

“When any motion in writing, affecting any pleading, or for judgment on the pleadings, shall be filed and ruling had thereon, said motion and the ruling and decision thereon shall be taken as a part of the record, without making the same such by a bill of exceptions.”¹

¹ Code, § 60.

No exceptions need be taken to opinions or decisions of courts of record sustaining or overruling demurrers, or written motions affecting or based on the pleadings, or overruling motions in arrest of judgment, motions for a new trial, or for continuance of causes, or giving, refusing or modifying instructions, but all such opinions and decisions, together with the demurrers, motions and instructions, shall be taken as a part of the record, without being made such by a bill of exceptions."¹

"All instructions offered by the parties, or given by the court, shall, with the indorsements thereon (which a preceding section requires the judge to make thereon) indicating the action of the court, be taken as a part of the record of the cause, without being made such by a bill of exceptions."²

The effect of the foregoing section of the Code is to make the above matters a part of the record proper, to dispense with the necessity of incorporating them into the record by means of a bill of exceptions, as was the rule prior to their enactment, and to require a court of review to review them in the same manner as it reviews the record proper. The decisions of the Supreme Court, made on records and judgments rendered before the above provisions became operative, are inapplicable to cases originating subsequently to the Code of 1887.

¹ Code, § 387.

² Code, § 187.

RECORD NECESSARY ON WRIT OF ERROR.

SEC. 88. When the transcript of the record is not lodged in the office of the court of review, at the time the writ of error is sued out, but the writ is first served on the clerk of the trial court, the mandate of the writ requires such clerk to transmit to the court of review with all convenient dispatch a true copy of all the proceedings therein, together with a true and perfect transcript of the record and proceedings in the suit aforesaid, with all the things concerning the same distinctly and openly, under the seal of your court, together with this writ, etc.

To comply with this mandate, the clerk is required to send up only the common-law record, with the matters made a part of the record by the Code of 1887. He cannot make any thing else a part of the record, by transcribing it in the record. Papers not intrinsically parts of the record at common law or by the Code do not become a part of the record by being incorporated therein by the clerk. Hence he should send up no matters outside of the record proper, otherwise than by sending up the bill of exceptions filed in the cause.¹

An illustration of what is a defective record is found in the case of *Dingle v. Swain*, 15 Colo. 120. Rule 8 of the Supreme Court, which is hereinafter set out, prescribes what the clerk shall certify to the

¹ *Wike et als. v. Campbell*, 5 Colo. 126.

court of review. The rule requires the following to be certified:

First, the process, with the return thereon; Second, the pleadings of the parties; Third, the verdict in jury trials; Fourth, the judgment or decree of the court below; Fifth, all motions specified in section 387, Civil Code of 1887; Sixth, the orders of court; Seventh, instructions; Eighth, appeal bond in cases appealed; Ninth, together with the original bill of exceptions.

This rule is applicable equally to appeals and to writs of error. The rule permits the attorney of the appellant or plaintiff in error to indicate by *precipe* what of the files of the cause shall be inserted in the transcript.

But the part of the record, in which the party alleges error to exist, will in a great measure regulate the contents of the transcript. Thus in case of a judgment by default, where no appearance was entered by defendant, the transcript will be composed of the process and return thereon; the complaint filed in the action; the entry of default, and the judgment entry. If the default be entered on service by publication, the record will show: First, the complaint filed; Second, the summons issued; Third, the return made by the sheriff of "defendant not found," which should show that the sheriff retained the summons ten days before he made the return thereon, as prescribed by the statute; Fourth,

the affidavit of non-residence of the defendant; Fifth, the order of publication; Sixth, the summons as published and the proof thereof; Seventh, the entry of default, showing the expiration of ten days after the last publication of the summons, and the judgment entry.

As a rule, where no errors are assigned on the matters which do not form a part of the record, unless made so by bill of exceptions, it will not be necessary to send up the bill of exceptions, though one have been filed in the trial court.

But in directing what parts of the record shall be transcribed, the attorney should be careful to omit nothing which has any bearing on the errors assigned, or from the absence of which from the record the court of review may presume against his assignment of error.

OF THE TRANSCRIPT OF THE RECORD.

SEC. 89. The party who desires to procure a transcript of the record of the cause for the purpose of suing out a writ of error or taking an appeal must file with the clerk of the trial court a *precipe*, in which he will indicate what of the files of the action or proceeding he desires to have incorporated in the transcript. The clerk will be governed by this *precipe* in making up the transcript of the record for the court of review. This procedure is in conformity with the requirement of rule 8 of the Supreme Court, "but if

the record so directed to be made shall be found by the appellate court to be insufficient for a proper consideration of the errors alleged to exist therein, it shall be perfected at his costs ; if unnecessarily voluminous, the costs of the unnecessary parts shall be taxed against him."

In compliance with the above rule the party should direct the clerk to omit from the transcript all parts of the record which have no bearing on the errors assigned. Thus, where the record shows a full general appearance by the defendant to the action in the trial court, a copy of the summons and of the return of service thereon need not be incorporated into the transcript ; for by an answer or demurrer being filed to the complaint a full general appearance is entered, and it is immaterial whether any summons was ever served on the defendant or not. Thereafter no error assigned to the sufficiency of the summons or of its service will be considered by a court of review.¹

So if the only errors assigned be found in the record proper as defined by Code, section 387, only those parts of the record, without which the court of review cannot properly investigate the errors assigned, need be incorporated in the transcript. If the error be in overruling a motion for a continuance, a motion for a new trial, etc., the affidavits, if any, used in support of such motions, are necessarily to be brought up by a bill of exceptions ; for though the Code does not

¹ Mining Co. v. Gill, 7 Colo. 100.

make it necessary to except to the ruling of the court on such motions, it does not make the affidavits used on such motions a part of the record, and hence a bill of exceptions will be indispensable to bring the affidavits before the court, that it may properly review the action of the court on such motion.

But if the errors alleged be in the admission or rejection of evidence, the allowing or overruling of motions, which are not a part of the record by section 387, and other matters and rulings during the progress of the trial, if the matters and rulings have not been made a part of the record by a bill of exceptions, the party cannot require the clerk to send them to the court of review, by incorporating them in the transcript.

Subject to the preceding suggestions the eighth rule of the Supreme Court should be followed as near as may be, according to the facts of the case.

The rule is as follows :

“Clerks of inferior courts, in making up an authenticated copy of the record in civil cases, shall certify to this court, First, a copy of the process, with the return thereon ; Second, the pleadings of the respective parties ; Third, the verdict of the jury ; Fourth, the judgment or decree of the court below ; Fifth, all written motions, affecting or based on the pleadings ; motions for new trials, or for continuances, and the decisions thereon, with the decisions mentioned in section 387 of the Code of 1887 ; Sixth, the

orders of the court ; Seventh, the instructions ; Eighth, the appeal bond, when the case is appealed ; Ninth, the original bill of exceptions.

The original appeal bond is not to be transmitted to the court of review, but is to be retained on file in the trial court, and a copy of it sent up in the transcript.¹

Each folio of one hundred words in the transcript must be numbered on the margin thereof.

Rule 9 further prescribes that :

“The proceedings be arranged in the transcript in chronological order,” that is, in the order in which the papers were filed in the clerk’s office, and the orders and rulings of the court were made in the proceeding or action.

PRECIPE FOR TRANSCRIPT — FORM.

SEC. 90. The *precipe* for a transcript may be in the form following :

STATE OF COLORADO, }
 — County, } ss.:

In the — Court of —, — county, to the — Term thereof,
 A. D. 18—.

A — B —, Plaintiff, vs. C — D —, Defendant.	}
---	---

The clerk of said court will make up an authenticated transcript of the record of the above-entitled action (or proceeding) lately

¹ Metzler v. James, 9 Colo. 117.

pending in said court, at the above-mentioned term thereof, and in said transcript will insert :

(Here designate the several parts of the record as pointed out in sections 88 and 89, ante.)

— —,
 Attorney for — —.

A careful observance of the suggestions made above, in sections 88 and 89, will enable the attorney to include in the transcript all that is necessary to a due consideration of his appeal or writ of error, and at the same time prevent his record from being unnecessarily voluminous.

In criminal cases the transcript must be made up as at common law, since no change has been made by the Criminal Code in the matters constituting the record and the Civil Code provisions do not apply to criminal procedure.

TRANSCRIPT — FORM.

SEC. 91. The first indispensable requisite of the transcript is the *placita*, to which reference has already been made herein (§ 86, page 114, *ante*).

The transcript usually is in form as follows :

TRANSCRIPT

of proceedings lately had in the — Court of — county, in the State of Colorado, in a certain civil action therein pending, in which — was the plaintiff and — was the defendant, at a regular term thereof, begun and held at the court-house in the city (or town) of —, in said county, on the — day of —, A. D. 18—, that

being the — day of —, A. D. 18—. (*Here state the day appointed by law, as the first Monday, etc., for the commencement of the term of the court.*)

Be it remembered, that on the — day of —, 18—, plaintiff filed in the office of the clerk of the — Court within and for the county and State aforesaid, a summons in writing, which is in words and figures as follows, to-wit: (Here copy summons verbatim), upon which summons is indorsed a certificate of the service thereof, which is in words and figures as follows, to-wit: (Copy certificate of service verbatim), which said certificate of service and summons were duly indorsed:

"Filed this — day, etc." (Copy the filing as it is on the summons verbatim.)

Also on the same day plaintiff filed his complaint in writing, which is in words and figures as follows, to-wit: (Here copy the complaint verbatim), then give the filing thereon, in the same manner as above shown on the summons.

Every paper required to be included in the transcript should be copied *verbatim*, with the file indorsements thereon, in the order in which they were severally filed. This constitutes the record proper. In it should be inserted nothing that properly belongs to the bill of exceptions. Then will follow the orders made by the court, as found entered on the journal, in like chronological order.

After the orders of the court will be a copy of the appeal bond, if the case is taken to the court of review by appeal, and the original bill of exceptions, except in criminal cases, in which the bill of exceptions is sent up *by copy*, and the original is retained in the trial court. To this transcript must be affixed

a certificate of the clerk of the trial court, under the hand of the clerk and seal of the court, that the foregoing is a true, full and complete transcript of the record and proceedings had and done in said cause as they appear from the files and record of said cause, now in said trial court.

This transcript is the only evidence of the proceedings of the trial court, to which the court of review can look for information as to what was done or ordered by the trial court in that cause. If a conflict is found between the statement of the record proper, and a statement of the same matter in the bill of exceptions, the statement of the record will control, since the record can never be qualified or varied by the bill of exceptions.¹

So deficiencies in the transcript of the record cannot be supplied in the court of review by affidavits. If such exist they can only be supplied by a supplemental transcript, or a suggestion of the diminution of the record.²

Care should be taken to see that the transcript of the record, which is obtained from the clerk of the trial court for the purpose of being filed in the court of review to obtain a writ of error thereon, is properly authenticated. This means that the certificate is to the effect that "the transcript is a full and complete transcript of the original record as it remains in the

¹ Kirkpatrick v. Wheeler, 8 Colo. 414.

² Barndollar v. Patton, 5 Colo. 29.

trial court ;" that the name of the clerk is thereto subscribed by himself or his authorized deputy; and that the bill of exceptions, if there be one in the case, is not only signed by the judge, but also that his private seal, that is a scroll, is affixed to his signature in the original bill, which in civil cases accompanies the transcript. The cases are numerous both in the Supreme Court of Colorado, and in that of Illinois, wherein a bill of exceptions has been disregarded by the court for want of a seal to the judge's name signed thereto.

The absence of a sufficient certificate, or of the clerk's signature, or of the court seal, or of a scroll to the judge's name to the bill of exceptions, has in numerous cases made the appeal or writ of error ineffective.

The transcript of the record is that upon which the decision of the court of review must be made. It can determine no matters outside of the record as filed therein.¹ Hence if the transcript be deficient in any thing requisite to enable the reviewing court to pass properly on the real questions at issue, it must first be determined how the deficiency was occasioned. If the omitted order have been made by the court, but inadvertently omitted by the clerk from the transcript, a supplemental transcript may be procured and, on leave obtained, be filed in the court of review. If through inadvertence the order made was not

¹ Clark v. Tabor *et als.*, 14 Colo. 434.

entered of record in the trial court, application will have to be made to the trial court for an order that the omitted order be made *nunc pro tunc*. The party should then apply to the court of review for a stay of proceedings in that court, until application can be made to the trial court for the order *nunc pro tunc*, and a supplemental transcript, supplying the deficiency, can be obtained and presented to the court of review. A motion will be granted in such case on a proper showing of the materiality of the omitted matters to a correct decision. So if the record transmitted incorrectly state the facts as they occurred in the trial court, leave to apply to the trial court for a correction of its record may be obtained, and a continuance had until such amendment is made by the court below, and a certified transcript of such amendment be brought to the court of review as a supplemental transcript, and leave asked to file it.¹

PROCEDURE WHERE RECORD IS DEFECTIVE.

SEC. 92. In cases of appeals where the statute requires the transcript to be filed on or before a certain day of the next succeeding term of the court of review, it will sometimes be found that the transcript is defective, and to correct such defects an application to the trial court becomes indispensable. This, however, will not excuse the appellant from complying with the requirement to file it. The correct

¹ Pleyte v. Pleyte, 15 Colo. 44.

practice in such a case is to file the copy of the record, in as complete a form as it can then be had, without the action of the trial court, unless the trial court be then sitting and be able to make the requisite corrections before the record must by law be filed in the court of review. If the trial court be sitting, application should at once, on discovering the errors or defects, be made to it and their correction be applied for to it. If this be done before the time for filing the record in the court of review arrives, no procedure is necessary in the court of review.

But if there be not time to procure the required corrections in the trial court, on filing the imperfect record a suggestion of diminution and a writ of *certiorari*, or leave to apply to the trial court for an amendment of its record, must be asked of the court of review. The court will take judicial notice of the regular sitting of the trial court next ensuing, and if satisfied that the postponement will promote the interests of justice and enable it to render a proper decision of the case, it will ordinarily grant the postponement. But if on examination of the record filed it will see that the corrections or amendments desired will have no effect upon the decision, it will deny the application and require the cause to follow its ordinary course in that court.

RECORD WHEN TO BE FILED ON APPEALS.

SEC. 93. The Code requires that "an authenticated copy of the record of the judgment or decree shall be filed on or before the third day of the next term of the Supreme Court ———, unless further time shall have been granted by the Supreme Court for good cause shown."

If, therefore, for any good cause, further time is desired by the appellant, within which he may be permitted to file the record, the application must be made to the court of review for such further time *prior to* the expiration of the time prescribed by the statute. Good cause must be shown for the granting of such application, by affidavits, or other proof satisfactory to the court. An application for further time, made after the statutory period has elapsed, will, ordinarily, be entertained only in cases of great importance and emergency, since by permitting the prescribed time to elapse without action, the adverse party becomes entitled to a dismissal of the appeal, which, if not made "without prejudice," is an affirmation of the judgment of the trial court.

The party making the application for further time should file his motion in the court of review before the expiration of the time prescribed, with such affidavits as he may have to present, and, if court be in session, call the attention of the court thereto, that proceedings by the adverse party may be arrested

until the motion is determined by the court. If court be not in session, the proper course will be to file the motion and affidavits, and at the earliest practicable period call the attention of the court thereto. A motion which is merely filed does not necessarily stay proceedings unless such stay is ordered by the court. Notice of the motion should also be served on the adverse party, since he is in court by virtue of the appeal, though he be the appellee.

CHAPTER V.

Exceptions and Bills of Exceptions.

- SEC. 94. Of exceptions to the rulings of the court.
95. What is an exception?
96. Exceptions allowed by the Code.
97. When no exception necessary.
98. Bill of exceptions in criminal cases.
99. When exceptions to be taken.
100. When bill to be presented to the judge.
101. Duty of judge to sign the bill.
102. When judge refuses or neglects to sign.
103. When judge absent from the State.
104. Original bill may be filed in Supreme Court.
105. When bill seeks to embrace depositions.
106. Original papers not to be in bill.
107. Bill of exceptions — its contents.
108. Some rulings as to bills of exceptions.
109. Exception to judgment, when necessary.
110. Bill of exceptions — evidence on the trial.
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112. Of procuring an amended bill.
113. Motion for a new trial, when unnecessary

OF EXCEPTIONS TO RULINGS OF THE COURT.

SEC. 94. Though the taking and preserving of exceptions to the diverse rulings and decisions of the trial court, made while the trial of the cause is in progress, is properly a part of the procedure of the trial court, a bill of exceptions is not infrequently a

most important part of the record, to be submitted to the court of review.

At the common law nothing was subject to review on error, if it did not constitute a part of the record proper of the action. The court of review would not review or pass upon any errors of law, which had been committed by the trial court, in ruling on the admissibility of evidence, determining motions, or any other proceedings had during the progress of the case from the inception thereof until the final judgment, because the matters so ruled upon formed no part of the record proper of the cause. Yet, in numerous instances, such rulings had a material influence on the decision of the cause, and were prejudicial to one of the parties litigant.

To remedy this defect in the procedure, a law was enacted in the reign of Edward the First, by which, when a party objected to any ruling or decision of the court as erroneous in law, the judges were required to allow an exception by a bill by them sealed, showing the matters so excepted to. This is known as the bill of exceptions, and being signed and sealed by the trial judge becomes a part of the record of the cause. It is the only means whereby every question raised by either party during the trial, on matters *dehors* the record proper, may be brought up for review, when decided adversely to the party who raises it.

The statute of Edward the First, being part of the common law, is in force in Colorado.

But at common law no bill of exceptions will lie in any criminal case, and hence the allowance of a bill of exceptions in prosecutions for crime is the creature of the statute.¹

Under the Colorado Criminal Code a bill of exceptions may be tendered and allowed in every criminal case.

WHAT IS AN EXCEPTION.

SEC. 95. During the progress of a cause through the trial court from the filing of the initial paper in the cause to the rendering of the final judgment in that court, many questions of law will arise, at its different stages, upon which the court will be asked to make its ruling. Such ruling is based on a motion made by one of the parties litigating, either orally or in writing. If the party, adversely to whom the ruling is made, is not satisfied with such ruling, and desire to make known to the court that he does not acquiesce in the correctness of the decision, he announces to the court that fact by asking that his exception to the ruling be noted and reserved on the minutes of the court. The principle on which such action is taken is that, unless he excepts at the proper time, he will be held to acquiesce in the correctness of the ruling, and however erroneous it may be, he will be precluded from thereafter raising an objection thereto in the court of review.

¹ Roscoe's *Crim. Ev.* 214; Russell on Crimes, vol. 2, p. 725; Wharton's *Pl. & Pr.* 772.

It will be noted that in the Colorado practice many points and rulings are subjects of an exception, which are usually treated as matters of pure judicial discretion in other States, and not subject to exception, in their practice.

Thus exceptions are allowed in cases of motions for a change of the place of trial, of motions for a continuance or postponement of a trial, and in a great many other instances in which the courts of other States do not permit exceptions, because such rulings are held to be purely discretionary, and not subject to review in the court of review, unless the court has grossly abused its discretion in the matter.

An exception is usually taken for several distinct purposes. One object is, that by calling the attention of the court to the particular point of the objection to its ruling, it may more carefully consider it and the exception taken to it, and if, on more mature consideration, it find its ruling to be erroneous, it can at once revoke its ruling and make a more correct decision on that point.

The second object of an exception is, that the court may be called upon to examine the point, when the motion for a new trial is made and argued, and determine whether it made an erroneous ruling on that point. It will not infrequently happen that in the course of a trial to a jury a question is sprung upon the court, which it is necessary to determine on a first impression and without much deliberation. This

is often the case where the question is raised for the first time in that court, and the court has not then sufficient time to search for and examine the decisions of other courts bearing thereon, or to consider properly the bearings of the point on the issues being tried. It is always proper in such cases to give the trial court an opportunity to reconsider its rulings, and modify, reverse or sustain them after a more careful consideration of the whole case as developed by the trial. This is one of the purposes for which a motion for a new trial is made, and on such a motion the court will more carefully consider the decisions made by it during the trial, and take ample time to examine the authorities and decisions bearing on the points raised. This examination will not infrequently lead to a reversal or modification of the ruling, and if of sufficient importance, a new trial will be granted by reason thereof.

The third object of the taking of an exception is to preserve the point for review in the court of review, if the trial court refuse to change or modify its ruling on exception or motion for a new trial.

EXCEPTIONS ALLOWED BY THE CODE.

SEC. 96. The Code provides that in civil cases " Exceptions taken to opinions and decisions of the court upon the trial of causes to a jury, or in which the parties agree that both matters of law and of fact may be tried by the court, shall be deemed to have

been properly taken and allowed, and the party excepting may assign for error before the Supreme Court any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and the evidence. The appellee or defendant in error may assign cross-errors in like manner on the record filed by the appellant or plaintiff in error, which cross-errors shall be heard and the decision rendered thereon at the same time that the cause is considered on the other errors.¹

The foregoing provision is merely an amplification of the provisions of the common law in relation to bills of exceptions.

By section 31 of the Code an exception may be taken to the ruling of the court on an application for a change of the place of trial of the cause, which, unless this provision had been made, would be considered a matter of discretion and not reviewable. But this provision is not found in the act providing for changes of venue in criminal cases of 1885, or the amendment of 1887, and hence the granting or refusal of a change of venue in a criminal case is not a subject of exception, unless the discretion of the court be grossly abused by its action on the application therefor.

Exceptions may be taken under the Code to any and every ruling and decision of the court upon a

¹ Code, § 386.

question raised by either party and decided by the court during the trial of the cause.

WHEN NO EXCEPTION NECESSARY TO BE TAKEN.

SEC. 97. The object of a bill of exceptions is to incorporate in and make a part of the record of the particular cause, those particular rulings and decisions of the court, made during the progress of the trial, to which a party takes exception as both erroneous in law, and prejudicial to his cause, which at common law would not be a part of the record.

Hence, if the alleged erroneous ruling be the sustaining of a demurrer to a pleading in the action for want of facts, when the pleading is sufficiently good in law, and states a good cause of action or defense, no exception thereto is necessary, as the error in the decision of the court will clearly appear upon the face of the record itself. No bill of exceptions need be taken in such case to preserve the objection. This rule has also been applied to the matters mentioned in sections 60, 187 and 387 of the Code of 1887. But though these matters are not required to be incorporated in a bill of exceptions to make them a part of the record, it will, however, be proper in all such cases to notify the court of the party's exception to its ruling to prevent the inference which might be drawn by the court of review, that the party assented by his silence to the correctness of the ruling. It is a maxim "*qui tacet, consentire*

videtur." Justice to the trial court also demands that he have the opportunity given him to correct inadvertent errors by their being called to his attention in apt time. It is presumed that the court would willingly correct the error, if given the opportunity to do so by the party. This notification of the party's dissent, by excepting, is peculiarly proper in cases of motions, determined on affidavits, in cases of applications for a continuance, and like motions, and in cases of giving, modifying and refusing instructions. The real purport of the Code amendments seems merely to dispense with the requirement that all such matters be incorporated into a bill of exceptions. It is said by the Supreme Court that, while the formality of noting exceptions in such cases is done away with by the Code provision, the record should show that by some proper objection he invited the trial court's attention to the alleged error and thus gave an opportunity for its correction at the time.¹

But if the error in the decision be in a ruling on the record, such as a ruling on a demurrer, or on the matters mentioned in section 387 of the Code, no exception is necessary, by the express provision of that section.

¹ Wray v. Carpenter, 15 Colo. 274.

BILL OF EXCEPTIONS IN CRIMINAL CASES.

SEC. 98. The Criminal Code provides :

“In the trial of any person or persons for any crime or misdemeanor, it shall be the duty of the judge before whom such trial is pending, to sign and seal any bill of exceptions tendered to the court during the progress thereof ; provided that the truth of the case be truly stated in such bill of exceptions ; and thereupon such bill of exceptions shall, by the clerk of said court, be entered in the record of such trial, and become to all intents and purposes a part of the record thereof.”¹

A difference between the Civil Code provision and that of the Criminal Code is to be noted. In the provision of the Criminal Code the judge is not required to sign the bill of exceptions tendered him, unless the truth of the case be truly stated therein. But in practice the same course is followed in both civil and criminal cases, and any misstatements, either intentional or inadvertent, in the bill as presented to the judge, are usually corrected by him, before he signs and seals the same.

The practice of many States by express enactment is to require the bill of exceptions, when prepared, to be presented to the attorney of the adverse party for examination, and the preparation of amendments thereto, if he deem any amendment necessary, and

¹ Crim. Code, Mills' Stat , § 477.

the presentation of such amendments to the judge within a specified time. No such enactment exists in Colorado, but the same practice is substantially followed, in both civil and criminal cases. As a sworn stenographer is usually employed in all courts of record, to take down stenographically all the proceedings of the court in all cases, there is usually little difficulty in settling a bill of exceptions, in either a civil or in a criminal case, for the court will take the stenographer's notes as the safest criterion to determine any dispute as to the accuracy of the bill. Except as hereinbefore noted, the practice as to bills of exceptions is the same in both civil and criminal causes.

WHEN EXCEPTIONS TO BE TAKEN.

SEC. 99. To make an exception available the bill must *affirmatively* show that the exception was prayed and allowed at the time of the making of the decision by the court. This is in practice done by the party who excepts saying to the judge: "The court will please note an exception to your honor's ruling." The stenographer then makes a minute of the ruling and of the exception thereto, and when the bill is prepared the exception is embodied therein by a statement, following the ruling, substantially as follows: "To which ruling and decision the defendant then and there excepted and does except."

The practice of some courts is to take a bill of exceptions each time that a motion is made in writing

and heard and allowed or denied. But in Colorado all exceptions are embodied in *one* bill, unless it be necessary to have separate bills by reason of the cause having been heard at different terms by different judges. In such case a separate bill, including all matters heard and determined by him, is signed by each judge.¹

In the case of *Fechheimer v. Trounstone* the Supreme Court says :

“The sole purpose of requiring judicial authentication of such bills is to preserve a correct transcript of matters *dehors* the record proper for use in the court of review. The presiding judge is familiar with these matters, and in most instances he is the only person competent to determine impartially the accuracy of the bill. If it should happen that two different judges presided during the progress of the trial, there should be two bills of exceptions ; each judge signing and sealing the one that embodies objections to the particular rulings made by himself.”

WHEN BILL TO BE PRESENTED TO THE JUDGE.

SEC. 100. At the close of the trial, it is the settled practice for the defeated party to ask and obtain leave to prepare and tender his bill of exceptions, and the court will then fix a time within which such bill shall be presented to him for his authentication

¹ *Fechheimer v. Trounstiene*, 12 Colo. 282; *Empire L. & C. C. Co. v. Engley*, 14 Colo. 289.

thereof. It must be presented within the time specified, unless an extension of such time is granted. In relation to this the Supreme Court says :

“ The settled practice in this State is, when the party tenders his bill of exceptions within the time fixed by statute or order, and the same be not at once authenticated, for the judge to mark thereon the fact and date of such tender ; and even though the bill be not actually signed or sealed until subsequent to the expiration of the period fixed, this tender and indorsement is deemed sufficient to protect his rights. The reason for this ruling is that, when the party has prepared his bill and tendered it to the judge, he has performed his duty, and the failure of the judge to sign and seal it would arise from no fault on his part.”

In the case of *Swem v. Green*, on a motion to strike the bill of exceptions from the files, because it was not filed within the time prescribed by the trial court, the order of the court was that “ the appellant have fifty days within which to prepare his bill of exceptions.” An indorsement by the trial judge thereon, over his official signature, showed that the bill was presented to the judge within the time prescribed, but he did not sign it and file it with the clerk of his court for several months after the time had expired. It was claimed that this indorsement was no part of the bill, and consequently no part of the record, of which the court could take notice, and that

it should be governed only by the clerk's file-mark, which clearly showed that the bill was not filed in time. But the court held that, though the judge's indorsement was no part of the bill, it was an official certificate by the judge that the bill had been tendered to the judge within the time allowed, and should be so regarded by the court of review. So in the case of *Gilpin v. Gilpin*, on a like motion to strike the bill from the files, it was held that the objecting party should show that his objection was true as a matter of fact, and if the presiding judge sign the bill, it will be presumed, in the absence of proof, conclusive of the truth of the objection, that the objection was not true, and will not be considered by the court of review.¹ In *Swem v. Green* the Supreme Court adopts the rulings of the Supreme Court of Illinois, in *Underwood v. Hossack*, 40 Ill. 98, that if the judge sign the bill, it will be presumed that he would not have done so if the bill had not been presented to him in proper time, and the ruling of the same court, that, when a judge certified that the bill had not been presented to him in time, it was properly stricken out.²

When a bill of exceptions has been made or filed under circumstances not authorized by law, the proper practice is to move first in the trial court to

¹ *Denver v. Capelli*, 3 Colo. 236; *Swem v. Green*, 9 Colo. 358; *Gilpin v. Gilpin*, 12 Colo. 504; *Fechheimer v. Trounstone*, 12 Colo. 283.

² *Underwood v. Hossack*, 40 Ill. 98; *Magill v. Brown*, 98 Ill. 235.

strike such unauthorized bill from the files of that court. If the motion be denied or allowed the party aggrieved should take a bill of exceptions to the decision of the court, incorporating therein the bill of exceptions stricken out and all the evidence heard by the court in support of the motion and against it, and this will enable the court of review to pass upon the question as to the correctness of the decision of the trial court thereon.¹

It is only when there is no question as to the correctness of the clerk's file-mark, as evidence of the time when the bill was filed, and no indorsement by the judge of its presentation to him in due time, within the cases cited in section 99, that the appellate court will strike the bill of exceptions from the transcript of the record. In such a case a motion to strike it from the transcript is made, before joining in error.

DUTY OF TRIAL JUDGE TO SIGN AND SEAL THE BILL.

SEC. 101. It is made by law the duty of the trial judge to sign and seal a proper bill of exceptions, when tendered to him in proper time, in both civil and criminal cases. The Code provides :

“ In all cases in courts of record, where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception to writing, it shall be the duty of the judge to allow the same, and

¹ Hyde Park v. Dunham, 85 Ill. 596.

to sign and seal the same at any time during the term of court at which such exceptions were taken, or at any time thereafter to be fixed by the court.”¹ See similar provision in Criminal Code.

The statute in civil cases specifies “during the term of court at which such exceptions were taken” as the time within which the judge is obliged to sign and seal the bill, if no time after the expiration of the term be fixed by order of the court.

Hence the party excepting has all of the term of the court after the decision excepted to is made, in which to prepare and tender his bill, without any order of the court in relation thereto. In counties, such as Arapahoe, wherein the court is almost continuously in session, unless the case is tried at or near the expiration of the term, it will be unnecessary to ask for time within which to prepare the bill. But if the case is tried at or near the close of the term, then time should be asked, if sufficient time within which to prepare the bill cannot be had before the term ends by law. It is when he desires time to be given after the adjournment of the term of court that he is required to ask for a designation of time for filing the bill. The allowance of time by the court will usually be construed as an allowance of time, after the expiration of the pending term, especially in counties in which the term lasts for at most one or two weeks. In *Gomer v. Chaffee*,

¹ Code, § 385.

where a motion for a new trial in a case pending at one term was postponed for a hearing to the next succeeding term, it was held that a bill of exceptions to all matters of the trial had at the preceding term might be properly allowed at the subsequent term, after the decision of the motion for the new trial.¹

It follows, therefore, that a bill of exceptions is not necessarily to be signed and sealed at the same term at which the decision is made, though it is, perhaps, good practice to take such bill each term, as to matters heard and determined in the action at that term, if the cause is not heard and finally determined by a final judgment at one and the same term.

When, as is customary in country districts, in which the term of court lasts only a few days or at most a few weeks, time is asked, the party should be careful to ask sufficient time, from and after a specified date. This is especially necessary to avoid the contingency of a temporary absence of the judge from his district, or from the State, during the time given. The time asked should be such as will give the party ample time to prepare his bill with due care, and enable him to present it to the judge wherever he may be in his judicial district. It may happen that at the time when the judge is called upon to sign and seal the bill, he may be engaged in holding court for another judge, in a distant district of the

¹ *Gomer v. Chaffee*, 5 Colo. 383.

State, and there is some doubt whether the bill can properly be signed and sealed outside of his proper district.

WHEN TRIAL JUDGE REFUSES OR NEGLECTS TO SIGN.

SEC. 102. There are occasionally cases in which the trial judge will refuse or neglect to sign the bill of exceptions, though it be presented to him in proper time. His reasons for refusing to sign it may or may not be good, and may justify his refusal to sign it or not.

In a criminal case the party's sole remedy for the refusal of the judge to sign the bill of exceptions, when he desires to procure its signature, is by a *mandamus* to the trial judge. It is well-settled law that *mandamus* lies to compel a judge to sign and seal a bill of exceptions in a cause tried before him. But in every such case the accuracy of the statements made in the bill must ultimately be determined by the judge himself. In a criminal case the court, out of which the *mandamus* issues, cannot determine what shall be the contents of the bill, where the accuracy of its statements is questioned, as it is permitted to do in a civil case under the Code. By the statute the judge is not required to sign or seal any bill, unless "the truth of the case is fairly stated therein." This is the old common-law rule in civil cases. Hence, if, in his return to the alternative writ of *mandamus*, the judge insists

that the bill by him signed is the correct bill, or that the bill he refuses to sign is materially incorrect, the court of review is powerless to require him to sign any other bill. But in a civil case he has two courses open to him. He may sue out a writ of *mandamus* to compel him to show sufficient cause for his refusal, or the party may resort to the following provision of the Code, if the case be a civil cause :

“ At any time, when any judge shall neglect or refuse to allow and sign and seal any bill of exceptions, then it shall be lawful for the suitor to make and attach to such bill of exceptions the affidavit of two or more attorneys of the court, or other persons, who were present at the time of the trial, and when such exceptions were taken, stating that such bill of exceptions is correct and true ; and when such bill of exceptions is so allowed and proved by affidavit, it shall thereupon be filed by the clerk and shall become a part of the record of the cause ; provided, etc.”¹

In proceeding under this provision it is requisite that : First. The judge must *refuse* or *neglect to allow* the bill of exceptions, and to sign and seal the same when presented to him at the term of court. No provision is made for a neglect or refusal to sign and seal the bill when presented to him out of court, though within the time fixed by him for the presentation of it to him for signature by him. Second.

¹ Code, § 385.

The affidavits to the truth and correctness of the bill *must be made by* two attorneys or other persons who have no connection with or participation in the case in which they make such affidavits; that is, they must be *disinterested persons*. Third. They must be persons who were present in the court-room at the trial, and *at the time* when the exceptions in the bill stated *were taken* by the party who presents the bill. To make such affidavits understandingly, they must have had their attention particularly drawn to the questions asked or the point discussed, to the ruling or decision of the court, and to the exception taken.¹

The section of the Code further requires:

“ Provided that when a bill of exceptions is sought to be preserved by affidavits, the opposite party shall have timely notice thereof, and may within a reasonable time thereafter file counter affidavits, and the appellate court shall, on notice and such proof as may be necessary, determine and settle what is the true bill in that behalf.”

From the foregoing section it is clear that the affidavits cannot be made by the attorneys who were engaged in the trial of the cause; Second, that the adverse party must have timely notice of the intention to authenticate the bill by affidavits; Third, that they shall be furnished with copies of such affidavits, so that they may be able to prepare counter

¹ Thornley v. Pierce, 10 Colo. 250; Meyer v. Binkleman, 5 Colo. 133.

affidavits and file the same within a reasonable time after the notice and receipt of such affidavits ; and Fourth, that if counter affidavits are filed, which contest the substantial allegations of the affidavits, it becomes the duty of the court of review to settle the bill. This is to be done on notice and motion by the party who seeks to authenticate his bill of exceptions by affidavits, and upon him lies the burden of proving his bill to be correct. The Supreme Court has not as yet had occasion to point out the proper procedure in such cases. It seems, however, that the bill of exceptions should be properly framed and presented to the trial judge for his signature, within the term, and if he refuse to sign the bill, that he be requested to indorse the fact of such presentation to him, the time of its presentation and his grounds for refusing to sign it, and sign such indorsement. He will ordinarily point out in such indorsement in what particular matters he deems the bill incorrect. If he neglect to sign and seal the bill within the time allowed by his order, the fact of its presentation to him in apt time, his detention of it beyond the time fixed, and his failure to sign and seal it will be made to appear by affidavit.

The party appealing, or taking the writ of error, will then petition the court of review, by a verified petition, for leave to prove the truth of the bill of exceptions, in those matters in which the trial judge claims it to be incorrect, by the affidavits of disin-

interested parties. Such parties should state in their affidavits that they were not then and are not, at the time of making such affidavits, interested in the action in which the bill of exceptions was tendered, or the attorneys for the parties therein; that their attention was particularly called to the matters excepted to, and that to the best of their knowledge the evidence was offered, and rejected by the court, etc., and that an exception was then properly asked and reserved. The affidavit should be specific as to the correctness of the particular matter, the correctness of which the judge questions. The court of review is not, however, limited to those affidavits, and may, if it see fit, call for the stenographer's notes in addition to the affidavits. The court will hear such other proof as it may deem necessary to a proper decision of the question involved.

Some Supreme Courts hold that it is in the power of the appellate court, when the trial judge refuses to sign and seal the bill, notwithstanding a writ of *mandamus* duly served on him, to order the bill to be considered as true, if its correctness is not questioned, and to have the same effect in the court of review as if it was duly signed and sealed. This procedure is recognized in Illinois, Alabama, and other States. But there must be no laches on the part of the party who tenders the bill.

Much difficulty has arisen in cases where, after the bill has been properly prepared, and presented to the

trial judge for his signature, the judge dies, or vacates his office by reason of the expiration of his term of office. In the former case the only remedy would seem to be a new trial for the party, as the settling of the bill being a judicial act, no one is competent to settle the bill except the judge by whom the cause was tried. But in one case in Pennsylvania the Supreme Court ordered the judge's minutes to be filed, on which the bill of exceptions was based. As courts of record now are authorized to employ official stenographers to make a minute of all the court's proceedings in the action, it seems that the stenographic notes may be used as the basis for determining the accuracy of the bill, not signed by the trial judge for the above causes.

As an attorney who practices in courts of review is presumed to have sufficient experience in drawing affidavits to enable him to prepare a sufficient affidavit in this case, we give no form of an affidavit here.

WHEN JUDGE ABSENT FROM THE STATE.

SEC. 103. It will occasionally happen that, during the time given for preparing the bill, the judge goes out of the State, or for some other reason is not accessible, so that he can be found for the purpose of presenting the bill to him for his signature and seal. In such case, if the party have not needlessly postponed the preparation of the bill, and has been guilty

of no fault on his part, and the judge is unexpectedly absent from the State, at the time it becomes necessary to present the bill to him, the practice approved by the Supreme Court is for the party to deposit the bill with the clerk of the court wherein the cause was tried, procure such clerk to indorse on such bill the time of its deposit, and then it may be signed and sealed by the judge on his return to his district. The judge's absence, it is held, will not prejudice the party's rights in such case.¹

ORIGINAL BILL MAY BE FILED IN APPELLATE COURT.

SEC. 104. When a bill of exceptions has been duly prepared and authenticated, as hereinbefore pointed out, it is then to be filed with the clerk of the trial court, as a part of the record of that court in the particular cause. Prior to the Code of 1887 the rule of practice required that the bill remain in the trial court, and when an appeal or a writ of error was taken, that it be copied into the transcript of the record. This rule is yet in force in criminal cases. But as in many civil cases the bill of exceptions is voluminous, and the copying of the same entails great expense and delay, the Code of 1887 provides, that in "all cases of appeals and writs of error from final judgments, the original bill of exceptions may be certified to the Supreme Court, without being transcribed," and "when a bill of exceptions duly signed is filed in the

¹ *Fechheimer v. Trounstine*, 2 Colo. 283.

court from which the appeal has been taken, the same may be by the appellant filed in its original form in the appellate court.¹

In civil cases, therefore, it is no longer necessary to transcribe the original bill in the transcript of the record, on appeal or writ of error. While it is not forbidden to do this, yet the practice is to attach the original bill to the transcript.

WHEN BILL SEEKS TO EMBRACE DEPOSITIONS, DEEDS AND OTHER PAPERS.

SEC. 105. The general rule of practice is that all depositions, deeds and papers offered in evidence during the trial shall be incorporated in the bill of exceptions at length. This rule has been modified by the Code by the following enactment :

“When the bill of exceptions seeks to embrace depositions the same may be done by reference, without copying the same in full, and the deposition so referred to may be transmitted to the appellate court, as part of the bill of exceptions. Deeds and other papers offered in evidence may be expressed in bills of exceptions by stating their purport and effect, so far as pertinent to the decision to be made by the trial court, and if the parties to the action fail to agree on the essential parts of such papers, they shall be expressed in substance or at length, as the judge signing such bill shall, in his discretion, decide.”²

¹ Code, §§ 392, 406.

² Code, § 392.

The foregoing section introduces a new rule and dispenses with the former rule, which required all depositions, deeds and papers to be copied in full into the bill of exceptions. While it allows the depositions to be made part of the bill by reference, and being attached to it, this provision is not made applicable to deeds and other papers, and, therefore, they do not become a part of the bill by being attached to it.

ORIGINAL PAPERS NOT TO BE INCORPORATED IN BILL.

SEC. 106. It is the rule of all courts of review that original papers shall not be presented in the appellate court by bill of exceptions, unless such original paper cannot be exhibited satisfactorily by a copy of it. But under the Colorado practice, allowing the original bill of exceptions to be transmitted to the court of review, if an original paper be incorporated in the original bill, filed in the trial court, when such original bill is transmitted to the court of review it will necessarily include the original papers included in the bill. But there may be instances when an inspection of an original paper, which has been filed in the trial court, is necessary to enable the court of review to properly determine some question raised by an assignment of error, though such original be not in the bill. The Code provides :

“ When a review of an original paper in an action, filed in the trial court, and not incorporated in the bill of exceptions, may be important to a correct decision

of the appeal or writ of error, the appellate court may order the clerk of the trial court to transmit the same to the clerk of the appellate court, which he shall do in some safe manner. The clerk shall hold the same subject to the control of the court."

BILL OF EXCEPTIONS — ITS CONTENTS.

SEC. 107. A bill of exceptions is the portion of the record into which a court of review looks for any matter which is assigned for error, that does not properly pertain to what is regarded as the record proper. In it must be found all motions, except such as section 387 of the Code makes part of the record, affidavits, bonds, and all papers offered in evidence, or to which objection is made, and the objection sustained or overruled, during the progress of the cause, from its inception and the filing of the first paper therein, until its final determination. As before said, matters not intrinsically a part of the record by common law or the Code cannot be brought to the attention of the appellate court by being transcribed in the transcript sent to the court of review. The court never pass upon any matter *dehors* the record, unless presented by a properly authenticated bill of exceptions. This is true in equity as well as in common-law actions.²

¹ Code, § 396.

² Blatchley *et al.* v. Coles, 6 Colo. 82; Marshall S. M. Co. v. Kirtley, 8 Colo. 108; Banks v. Hoyt, 11 Colo. 399; Brink v. Posey, 11 Colo. 521.

Hence in *Blatchley v. Coles*, on motion to strike from the files in the Supreme Court a supplemental transcript of the record, in which the evidence taken by a referee in a chancery case was brought to the Supreme Court by a bill of exceptions, the Supreme Court held that a bill of exceptions is the only mode provided by the Code, for bringing up the evidence in a chancery case as well as in a law case. So in *Mining Co. v. Kirtley* it was held that evidence, instructions and exceptions must be incorporated into the record by bill of exceptions; and as in that case the alleged bill had not been sealed by the judge, it refused to recognize the bill as a bill of exceptions, and to pass upon the assignments of error based upon that bill. So in *Banks v. Hoyt* it was held that objections to instructions rest on matters *dehors* the record, and that the instructions must be incorporated into the record by bill or they will not be considered. But it is now otherwise by section 387 of the Code. So in *Brink v. Posey* it is held that a motion to strike out certain allegations in a replication, and the action of the court on such motion are not part of the record proper. The rule is, however, changed by the Code in this respect.

So it is held that a bill of particulars is no part of the record, and if objection is made thereto for any cause, the bill, objections and rulings of the court must be duly preserved in a bill of exceptions. There

are many decisions on this point in the reports, which it is needless to cite *in extenso*.¹

SOME RULINGS AS TO BILL OF EXCEPTIONS.

SEC. 108. The rulings of the trial court on questions which arise during the trial, and the objections and exceptions thereto made by the respective counsel of the parties, must be preserved in a bill of exceptions. Unless so preserved, no ruling of the court, however improper it may be, as to any matters which do not affect the pleadings, or appear on the face of the record proper, can be reviewed by the court of review. Hence the clerk's recital in the transcript of the record, that exception was taken to the judgment of the court, or to the rulings and decisions of the court on motions for a new trial, or in arrest, etc., or to the giving, modification of or refusing of instructions and like matters, does not, in the absence of a bill of exceptions, duly signed and sealed by the judge, make such matters a part of the record, or entitle such matters to be reviewed by the court of review. It does no good for the clerk to copy such matters into the record. Errors assigned on such matters, when not found in the bill of exceptions, will not be considered by the court of review.²

The record, so far as the bill is concerned, is made by the court. In signing the bill it states only such

¹ Fryer v. Breeze, 16 Colo. 323.

² Steffy v. People, 130 Ill. 101; Gould v. Howe, 127 Ill. 252; Harris v. People, 130 Ill. 463.

facts as have already happened during the progress of the cause, within the knowledge of the court. A bill cannot make that a matter of record which has not happened, nor should the court certify, even by agreement of the parties, to that which has not taken place within its own knowledge. So the omission to incorporate certain papers into the bill of exceptions cannot be remedied by a stipulation entered into by the parties, after such bill has been duly signed and sealed by the judge, that such papers may be considered as incorporated therein, on being attached thereto by the clerk. The determination of what the bill shall contain is a judicial act, which the court has no power to delegate. The remedy in such case is by an application to the court to amend the bill, or allow an amended bill to be filed, including the omitted matters.

So a stipulation that the stenographer's notes shall be treated as a bill of exceptions will not avail to make them serve as a bill of exceptions.¹

A bill of exceptions is held to be a pleading of the party who frames the bill, not a writing of the judge, who signs and seals it, and if the statements of the bill be open to a charge of uncertainty, ambiguity, or omission of any thing material to maintain his assignment of errors thereon, the bill, like all other pleadings, and its allegations, will be construed most

¹ *Byrne v. Clarke*, 31 Ill. App. 652; *Schwarze v. Spiegel*, 41 Ill. App. 355.

strongly against the party who presents it. In framing the bill, therefore, he should be careful by distinctness of statement, and the use of clear and intelligible language, to make the point of each objection and exception so clear as not to be misunderstood or misconstrued by the court of review.¹

In theory, the party tendering a bill of exceptions is bound to state accurately the facts of the case upon which his exception is taken, with the ruling of the court excepted to. If his statement is not correct, the court may refuse to sign and seal such bill, and allege its material incorrectness as the ground of such refusal. The court is under no obligation to revise and correct the bill, and will examine it for the sole purpose of determining whether it is substantially correct. But in ordinary practice the judges point out the errors therein, and suggest their correction by the party. For this purpose also, in some States, the bill is required to be submitted to the adverse attorney for inspection, and if he allege error therein, the judge is required to determine the correctness of the bill on a hearing of objections thereto. The corrections ordered are then made in the bill, and the bill is then signed and sealed.

When thus corrected, and signed and sealed by the judge, it becomes a part of the record of that

¹ *Rogers v. Hull*, 3 Scam. 5; *Garrity v. Hamburger Co.*, 136 Ill. 513; *Spahn v. People*, 137 Ill. 546; *Monroe v. Snow*, 33 Ill. App. 232; *Alley v. Limbert*, 35 Ill. App. 593; *Brown v. Griffin*, 40 Ill. App. 559.

particular cause. As the presumption is entertained in favor of the correctness of the decision of the court on every question determined by it during the trial, great care must be taken in preparing the bill of exceptions to incorporate therein every thing, which may be necessary to enable the court of review to see not only that the errors complained of exist, but that the rulings complained of were prejudicial to the party complaining.

He should incorporate into his bill, but only when he intends to make an assignment of error therein, all motions made by either party in writing, the objections made to the motion, the ruling of the court, with all affidavits and counter affidavits used at the hearing, all exceptions asked and allowed, bills of particulars, when furnished, with all motions relating thereto, the action of the court on such motions, and exceptions taken and allowed, all documentary evidence admitted or excluded on the trial, with the statement of the objections made, allowed or overruled by the court, and exception taken to such ruling; the evidence, when the trial is before a referee, and all objections made thereto and allowed or denied by the referee, with all action taken in the court on return of the referee's report; all the evidence heard or offered and excluded, on a trial to the court or jury, with the rulings of the court and exceptions taken; objections to amendments of pleadings, etc., and in fact every thing that

may be of value to him in maintaining his assignment of errors.

If he intend to contest his case in the court of review upon the evidence, he will bear in mind that a court of review will not consider the evidence heard in the trial court unless it is brought before it by a bill, and that such evidence will not be considered on a stipulation that the stenographer's notes of evidence are to be treated as a bill of exceptions.¹

But this is only as to stipulations, which are intended to take the place of a bill of exceptions, and are made in the first instance in the court of review. It does not apply to stipulations as to what shall be considered as the evidence in the case, made in the trial court, and brought to the court of review by a properly authenticated bill.

But a stipulation, though made in a trial court, that the stenographer's notes shall be considered to be the bill of exceptions is good only as a stipulation that the evidence as taken down by him is the evidence in the case, heard at the trial. Consent of counsel will not make it serve to show exceptions to rulings of the court, and their allowance by the court, or to show any thing other than a correct statement of the evidence heard at the trial. If exceptions are to be considered by the court of review, such a stipulation does not require the court to consider them,

¹ Ross v. Duggan, 5 Colo. 105; Mollandin v. RR. Co., 3 Colo. 173; Capelli v. Denver, 3 Colo. 235; McKenzie v. Ballard, 14 Colo. 426.

and the court will not review such exceptions, if not embodied in a bill of exceptions, duly signed and sealed by the judge of the court.

When the evidence heard on the trial is incorporated in the bill, it must be clearly and distinctly stated therein that "*all the evidence* heard at the trial of the cause" is found in the bill, or the court of review will be precluded from reviewing the case on the evidence, or passing upon the sufficiency of the evidence to support the judgment.¹ There are numerous cases in the reports of the Colorado Supreme Court all distinctly announcing this rule. In making such statement the word "*testimony*" should not be used in lieu of the word "evidence." The word "testimony" embraces only the statements of the witnesses, made under oath or affirmation, while the word "evidence," in the legal acceptance of the term, includes all the means by which any matter of fact, the truth of which is submitted to investigation, is established or disproved. It, therefore, includes both oral and written declarations, and documentary proof. A bill of exceptions is indispensable, and must state that it contains *all* the evidence, when it is assigned for error that the evidence does not support the judgment.²

¹ Gordon v. Darnell, 5 Colo. 302; Martin v. Force, 3 Colo. 199; Law v. Brinker, 6 Colo. 555; Harkinson v. D. P. A. Co., 6 Colo. 269; Gibbs v. Wall, 10 Colo. 153; Schwed *et al.* v. Robson, 12 Colo. 400; York v. Fortenbury, 15 Colo. 129.

² Bouvier's Law Dict., tit. "Testimony;" 1 Greenl. Ev.; 1 Thompson Trials, § 2784; Bergundthal v. Bailey, 15 Colo. 257.

EXCEPTION TO JUDGMENT—WHEN NECESSARY.

SEC. 109. It is held by the Supreme Court, in repeated decisions, that in all cases where a trial is had to the court without a jury, if the party aggrieved by the judgment desire to have the sufficiency of the evidence to support the judgment reviewed by the appellate court, an exception must be taken to the judgment. Such exception is not preserved by a statement, made by the clerk in the record entry of the judgment, that the party excepted to such judgment. If an exception to the judgment be not properly taken and preserved, the court of review will not entertain and pass upon an assignment of error, that "the judgment is not supported by the evidence."¹

But an omission to except to the judgment does not preclude the court from considering errors assigned, based upon exceptions duly reserved during the progress of the trial, and all such errors, except that which calls in question the sufficiency of the evidence to support the judgment, will be passed upon by the court of review.²

BILL OF EXCEPTIONS—EVIDENCE ON THE TRIAL.

SEC. 110. It is especially, when the appellate court is called on to review the evidence heard in the trial

¹ Col. Spgs v. Hopkins, 5 Colo. 206; Breen v. Richardson, 6 Colo. 605; Phelps v. Spruance, 1 Colo. 414; Law v. Brinker, 6 Colo. 555; Brown v. Landon, 11 Colo. 162; People v. McCoy, 132 Ill. 140; Bank v. LeMoyne, 127 Ill. 254.

² Patten v. C. & T. B. C. M. Co., 3 Colo. 265, and cases cited above.

court, for the purpose of determining its sufficiency to support the judgment, that the proper framing of the bill is of vital importance to the appellant or plaintiff in error. It should be framed with the utmost care, so as to contain not only *all* the evidence heard at the trial, but also all evidence offered by the party and excluded by the court, with an exception taken to the ruling excluding it ; all evidence admitted by the court, over objection by either party ; the objections stated to that evidence ; the reasons stated in support of such objections ; the ruling and decision of the court, admitting or excluding such evidence, and the exception taken to such ruling.¹

The failure to state the reasons of the exception often renders the exception unavailing in the court of review. Hence, the party excepting should insist upon his grounds for making the objection, as stated to the court, being taken down by the stenographer in his notes, that the grounds of objection stated in the trial court may be known to the appellate court. In transcribing the notes of the stenographer for the purpose of making up the bill, special care should be taken to have each objection in perspicuous, intelligible and unambiguous language, so that the point of both the objection, of the decision and of the exception thereto may be clearly expressed, and not be susceptible of misconstruction. The language of

¹ Ward v. Wilms, 16 Colo. 87.

the bill, if uncertain or ambiguous, or capable of several meanings, will be construed most strongly against the party who prepares it. Care should also be taken that the bill show that each exception was taken at the time of the ruling excepted to, and not at a later period of time during the progress of the trial.

OBJECTIONS TO EVIDENCE.

SEC. 111. When the bill shows that the evidence was objected to, it must state whether the objection was to its relevancy, under the issues, or its incompetency for the specific purpose for which it is offered, or its incompetency for any purpose; whether the objection is taken to the competency of the witness or to his testimony. The specific grounds of the objection must unmistakably appear by the evidence offered, or be brought to the attention of the trial court at the time of making the objection, and not left to conjecture or inference.¹

The cases in which courts of review are called on to review the evidence are of two classes: The *first*,—when the party making the objection to the evidence is overruled, and he takes an appeal from the final judgment, or takes a writ of error. The *second*,—when the objection is sustained and the evidence is excluded, and the adverse party takes a writ of error or appeal.

¹ Gilpin v. Gilpin, 12 Colo. 517.

In the first case, where the party who makes the objection is overruled, the evidence admitted and by reason of the admission of such evidence a judgment is rendered against him, he must state in the bill what the question was, which was asked,—the answer given to such question, or what the evidence, if documentary (setting it out in full), which was admitted over his objection. This is necessary to enable the reviewing court to determine whether the admission of the evidence was detrimental to his case. It must also appear that the evidence so admitted, over his objection, had a tendency to injure him, and the evidence appearing in the bill must raise a presumption that he may have been injured by its admission. But when the ruling is beyond question erroneous, the court will presume that the party, over whose objection the evidence was admitted, was injured by its admission, unless the contrary clearly appear to the court.

In the *second* case, when the objection to the evidence is sustained by the trial court, and the evidence offered to be introduced is excluded, the party who claims to have been aggrieved by such exclusion must see that his bill states :—What questions he asked, or what evidence he offered to introduce; Second, that the evidence so offered was excluded by the court; in such case it should show that he distinctly stated the evidence which he proposed to introduce, and its bearing on the issues then being

tried; the nature of the objections made by the adverse party to the introduction of such evidence, and the ruling of the court sustaining the objection, and what objections, if several, but not all, were sustained, and his exception to the ruling of the trial court.

There are certain well-established rules, which are controlling in the making of objections to the admissibility of evidence at the trial of a cause. *First.* When an objection is made by a party to evidence, which the adverse party offers to introduce, justice both to such party and to the court requires that the objection be made on specific grounds, so that the party who offers the evidence may remove the grounds of the objection thereto, if it be in his power to do so at that time.¹

Thus if the objection to the question be that it is leading, and the case be not one where the court may, in its discretion, permit leading questions to one's own witness, the form of the question may be so changed as to avoid that objection. If the objection be that the evidence offered is irrelevant to the issues in the case, the party offering it may satisfy the court how and in what manner it is relevant. If the objection made be to the competency of the witness to testify in relation to the matters inquired of him, his competency may be shown, as in the case of

¹ Higgins v. Armstrong, 9 Colo. 38.

experts, etc. If it be objected that the evidence offered is immaterial, the objection may be removed by showing its materiality. If the objection be to the order of its introduction, the party offering it may withdraw the offer for the time being, and again offer it at a subsequent period of the trial. Courts of review invariably hold that all objections to evidence, which are capable of being removed, when proper objection is made thereto, must be made first in the trial court, and be brought up from that court by bill of exceptions. They will not be entertained if made for the first time in the appellate court.

Second. A general objection to the evidence will not be sustained by the appellate court, unless the evidence offered and excluded be clearly unavailable to the party offering it, for any purpose whatever within the pleadings, and its unavailability cannot be remedied by a more specific objection, which might be removed. Thus, in *Gilpin v. Gilpin* it is said: "General objections, or objections without specific grounds therefor being stated, may, as a general rule, be safely overruled, unless the testimony sought to be introduced is of such a character as to be inadmissible for any purpose whatever, and the grounds of its inadmissibility must unmistakably appear, or in some manner be brought to the attention of the court at the time of the ruling, and not be left to conjecture or inference." Cases where a general objection will suffice are rare in practice, and all au-

thorities are unanimous that a party cannot safely risk a point on a merely general objection.¹

Third. The bill must show that the proper specific objection to the evidence was made in the trial court. The objection made must be such that the court can put its finger on the point of the objection. Thus an objection that the evidence is irrelevant will not be sustained, unless the objector specifically state in what respects the offered evidence is irrelevant to the issues being tried, unless the court can clearly see that under no possible circumstances can the evidence be relevant. An objection that the evidence is incompetent does not raise any other question than that of its competency, and though the question be immaterial, irrelevant and improper, or leading, or objectionable for any other reason, it must be incompetent to justify the trial court in sustaining the objection made. And it is held to be error for the court to sustain an objection to evidence on other grounds than that specified, unless the evidence be inadmissible for any purpose whatever in the action.

Fourth. The appellate court will not consider an objection to evidence *admitted*, when the only issue in the case, to which that evidence was applicable, was found by the court or jury in favor of the appellant or plaintiff in error.²

¹ Gilpin v. Gilpin, 12 Colo. 517; Ward v. Wilms, 16 Colo. 88.

² Schiffer v. Adams, 13 Colo. 578.

Fifth. It is the uniform rule of courts of review to sustain the ruling of the trial court, if the specific objection made in that court be untenable, without examining the record for other well-founded objections which exist, which, had they been properly made and in apt time, would have justified a different ruling in that court.

The foregoing remarks are here made to call the attention of the practitioner to the importance of clear and specific statements at the time of making objections to evidence; of making the objections on correct grounds, and then saving the proper exception at the time, as a careful examination of the reports of cases decided will show that very many cases are decided contrary to the expectation of the party complaining because the proper objection has not been made or that the exception has been improperly reserved and noted in the bill.

OF PROCURING AN AMENDED BILL OF EXCEPTIONS.

SEC. 112. It will sometimes be found that the original bill fails to fairly present matters which actually transpired at the trial, and are material, and that this is occasioned by mistake, oversight or inadvertence. In such case it is the right of the party affected by such mistake to have a proper bill of exceptions, made so by amendment, signed and sealed by the trial judge, on proper notice to the adverse party. To make such amendments, however, the

court must have sufficient memoranda or notes to show it what actually took place at the trial, and in what respect the bill as filed, is incorrect. The proceeding to obtain the amendment must be initiated in the trial court and before the same judge who presided at the trial. If it affirmatively appear from the amended bill that the amendment was made solely on the recollection of the trial judge, the amended bill will be stricken out in the court of review as unauthorized. But unless the contrary affirmatively appears, it will be presumed that the trial judge made the corrections by sufficient memoranda in his possession.¹

MOTION FOR A NEW TRIAL WHEN UNNECESSARY.

SEC. 113. Under the practice, as it existed previous to the Code of 1887, whenever there was a trial of an issue of fact, whether before a jury, a referee or the judge, it was necessary to make a motion for a new trial, and in such motion to assign all errors deemed prejudicial to the party making the motion, as a requisite to obtain a review of such errors on appeal or writ of error. The Code of 1887 has changed this rule in some respects. It provides that :

“ A motion for a new trial shall not be necessary to enable the appellate court to review the judgment and orders of the trial court, where the matters al-

¹ People v. Anthony, 129 Ill. 221.

leged as errors have once been passed upon by such court, against exceptions made at the proper time."¹

Hence, where the party has duly excepted to the rulings of the trial court made during the trial of the issues of fact, and reserved his exceptions properly, at the time of making the rulings, contrary to the former rule, a motion for a new trial is not necessary to authorize the court of review to review those rulings.

But though unnecessary as a prerequisite to a review in a higher court, a cautious practitioner will not neglect to prepare and present his motion for new trial, in a case of any importance, as he may thereby procure from the trial court a beneficial change or modification of the rulings of which he complains, and thereby save the expense and delay incident to an appeal or writ of error. On the argument of the motion for a new trial, he may be able to convince the court that it has committed substantial error prejudicial to him, and may thereby procure a retrial, if it was heard before a jury, or a modification of the judgment, if tried to the court.

¹ Code, § 393.

CHAPTER VI.

The Assignment of Errors.

- SEC. 114. Of the assigning of errors.
- 115. Some decisions as to matters not assignable for error in the court of review in the first instance.
 - 116. What assignable for error.
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 - 118. Other errors in record proper.
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 - 122. Error in instructions.
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OF ASSIGNING ERRORS.

SEC. 114. When the attorney for the plaintiff in error, or appellant, has received from the clerk of the trial court a duly authenticated transcript of the record in that action or proceeding, he should, before lodging it with the clerk of the appellate court, carefully examine it to ascertain whether there are any errors or omissions in such transcript. He should particularly look to the bill of exceptions, and see if it have been properly signed and sealed by the trial judge; and in a criminal case, where the bill is not sent up in its original form, whether the clerk has

truly copied the signature and seal of the judge. If, on an examination of it, he find any errors and omissions, the omissions should be supplied and the errors corrected before he prepares the assignment of errors and files the transcript with the clerk of the appellate court. If the errors are mere clerical errors of the transcriber, he should at once have them corrected by the clerk of the trial court. If the errors or omissions in the transcript are such as require the action of the trial court to correct them, application should at once be made to the trial court, on notice to the adverse party, for the correction of its record. If this can be done in cases of appeal, before it becomes necessary to file the transcript in the appellate court, as required by the statute, it should be done at as early a day as possible. If, however, the trial court be not sitting, the imperfect transcript should be filed in the appellate court, and application be made thereto for an order staying proceedings until an application can be made, at the next sitting of the trial court, to correct the errors and supply the omissions in its record. The appellate court will grant the necessary stay of proceedings on a proper showing. When the errors have been corrected and the omissions supplied by the trial court, a supplemental transcript, containing the required corrections, will then be obtained, and a motion be made in the appellate court for leave to file the supplemental transcript.¹

¹ Stebbins v. Anthony, 5 Colo. 342.

The rule of the Supreme Court requires that the errors which are claimed to exist in the record shall be assigned in writing and be indorsed on or be appended to the transcript at the time of filing the record. If this rule be not complied with, the writ of error or appeal may be dismissed.

An assignment of errors must be made on the record as a part of the record. Hence it is not a compliance with the rule to make the assignment of errors on a separate sheet of paper and insert it in the record. It must be attached firmly to the transcript, as a part thereof. Thus, where a loose paper, unsigned, without title of court, or cause, or a file-mark, was found by one of the judges among the printed matter in the case, when it came to him after conference, though it seemed to be intended as an assignment of errors, it was wholly disregarded by the court.

This rule is also applicable to the assignment of cross-errors. To entitle them to consideration by the court, they must be assigned upon or attached to the record filed.

Where this is not done, the court treats the case as without an assignment of errors, and will affirm the judgment of the trial court without a further hearing unless leave be given to file an assignment of errors.

In the case of *Home et al. v. Duff et al.*, the Supreme Court refused to dismiss the writ of error for

failure to assign error until the last day before the beginning of the term, it appearing that no real or considerable delay was occasioned by such failure, but imposed terms on the party in default. In *Haas v. Co. Commissioners*, where no errors whatever were assigned, the appeal was dismissed.¹

An assignment of errors is a pleading of the appellant or plaintiff in error, and following the rule as to all pleadings will be most strongly construed against the pleader. It performs the same office in a court of review as a complaint in a trial court of record, and is indispensable to enable the reviewing court to affirm or reverse the judgment of the trial court.

There are certain well-established rules which govern the assignment of errors :

First. Error in the proceedings of the trial court is never presumed. The regularity and correctness of all the proceedings, rulings and decisions made during the progress of the cause is presumed, until the contrary is conclusively shown. The party assigning error attacks the regularity of such proceedings, and the correctness of the rulings and decisions and thereby assumes the burden of overcoming such presumption by showing the existence of error therein.

¹ *Home v. Duff*, 5 Colo. 344; *Haas v. Co. Comm.*, 5 Colo. 125; Rule 13 of Supreme Court; *Lancaster v. Ry. Co.*, 132 Ill. 494; *Capek v. Kropik*, 129 Ill. 514; *Ins. Co. v. Travelstead*, 29 Ill. App. 660; *Bogue B. Co. v. Boyden*, 33 Ill. App. 252.

Second. Each error, which is claimed to exist on the record of the cause, must be specifically assigned as such, and the place where it exists in the record must be specifically pointed out. A general assignment of error, that the court erred in admitting improper testimony, or erred in rejecting proper or material testimony; a general assignment of error, that the court erred in giving all the instructions given for the plaintiff, or for the defendant, and in fact all assignments of error which are not sufficiently specific, will be disregarded by the court of review.¹

Third. The error alleged must appear to have caused injury to the party *who assigns it*. A plaintiff in error will not be permitted to assign for error any ruling of the trial court in the cause which does not prejudice his individual rights, although it may have injured another party to the cause who does not join in prosecuting the writ of error. The rule, however, is different where the co-defendant has a joint interest with those who complain, and has a right to insist on a decision which shall settle the respective rights of all the parties concerned. Thus errors assigned on behalf of parties who have been improperly made parties and have been dismissed from the suit for that reason will not be entertained by the court. The proper procedure in such case is

¹ Rule 13 of Supreme Court; *RR. v. Smith*, 5 Colo. 160; *Hanna v. Barker*, 6 Colo. 303.

to move to strike such assignments from the assignment of errors.

So error cannot be assigned on any matter, unless the trial court has had its attention called thereto, and made a ruling thereon, or refused to rule thereon, and the proper exception have been taken at the time.¹

If there are several plaintiffs in error or appellants, the court of review will not consider an assignment of error, unless such error is prejudicial to all who prosecute the proceedings in error.

Fourth. When the errors assigned exist in that portion of the record which does not constitute the record proper, it will not be considered by the reviewing court, unless an exception to the decision or ruling of the trial court was properly taken and reserved, and is brought to the appellate court by a duly authenticated bill of exceptions.²

To these rules there are two specific exceptions. The *first* exception is, when the trial court had no jurisdiction of the subject-matter of the action or of the party defendant against whom the judgment was rendered.

The *second* exception to this rule is, when the complaint filed in the action in the trial court does not state facts sufficient to constitute a cause of action

¹ M. T. Co. v. Ill. T. & S. Bank, 129 Ill. 297; Brown v. Miner, 128 Ill. 154; Harding v. Durand, 36 Ill. App. 239; Alley v. Limbert, 35 Ill. App. 594.

² Kinneer v. Tucker, 1 Colo. 74; Delappe v. Sullivan, 7 Colo. 182.

against the defendant. These objections may be raised at any stage of the case, and can be taken in a court of review for the first time.¹

SOME DECISIONS AS TO MATTERS NOT ASSIGNABLE FOR
ERROR IN A COURT OF REVIEW, IN THE FIRST
INSTANCE.

SEC. 115. First. An objection that there is a variance between the complaint and the proof on the trial in the trial court is not assignable as error, when made for the first time in the appellate court.²

Second. Where an erroneous instruction is given at the instance of the party who assigns error, he cannot be permitted to assign such instruction for error in the court of review.³

Third. That plaintiff was permitted to file an amended complaint, and that such amended complaint introduced a new cause of action cannot be raised in a court of review in the first instance.⁴

Fourth. An objection to the form of the verdict cannot be made in the appellate court in the first instance.⁵

Fifth. An objection that a defense relied on in the trial court is not an available defense may not be made in the court of review in first instance.⁶

¹ *Marriott v. Clise*, 12 Colo. 564.

² *Smith v. Roe*, 7 Colo. 95; *McCoy v. Wilson*, 8 Colo. 337; *King v. DeCoursey*, 8 Colo. 463; *Williams v. Mellor*, 12 Colo. 1.

³ *Leitersdorfer v. King*, 7 Colo. 437. ⁴ *King v. Rea*, 13 Colo. 69.

⁵ *Quimby v. Boyd*, 8 Colo. 200; *Ry. Co. v. Woodward*, 4 Colo. 1.

⁶ *McCoy v. Wilson*, 8 Colo. 337.

Sixth. An objection in an adverse claim suit, that the action was not brought in time, cannot be made in the first instance in the appellate court.¹

Hence, when assigning errors, the plaintiff in error, or appellant, must be careful to assign as error no matter which is neither not to be found in the record proper, or is not brought into the record by a proper bill of exceptions, if he desire such assignment of error to be passed upon by the court of review.

In the preparation of the assignment of errors it must be borne constantly in mind that every error which the court may have committed during the progress of the trial will not be sufficient to authorize a reversal of the judgment. Hence, unless the question raised be one of practice, in which it is desirable that the practice be settled for the government of trial courts, the points to be considered by the party assigning error are :

First. What apparent errors are found in both the record proper and in the bill of exceptions?

Second. Does any thing appear in the transcript, from which the appellate court may infer a waiver of any of such errors?

Third. Have exceptions been taken and properly preserved to any erroneous ruling or decision of the trial court, and do the taking of such exceptions, the exceptions themselves, and the rulings excepted to, properly appear in the bill?

¹ Marshall S. M. Co. v. Kirtley, 12 Colo. 417.

Fourth. Are such errors prejudicial to the party assigning error?

Fifth. Are such errors of such a nature, that a reversal or modification of the judgment may reasonably be expected in the appellate court?

If the above points are carefully considered when preparing the assignment of errors, the practitioner will be spared the trouble and labor of assigning errors, which will either be ignored by the court of review, or held not to be available to the party assigning them.

WHAT ASSIGNABLE FOR ERROR.

SEC. 116. When preparing to assign errors on the transcript, the first point to which attention should be directed is the jurisdiction of the court over the subject-matter of the action and of the defendants. Except in cases exclusively within the jurisdiction of the Federal court, want of jurisdiction of the subject-matter of the action can rarely exist in the District Courts of the State. By the Constitution the District Court has original jurisdiction of all causes both at law and in equity. Hence no cause of action whatever is presumed to be without its jurisdiction, and if the error be assigned that the District Court has no jurisdiction of the cause of action set out in the transcript, the party assigning such error must specifically point out wherein and by what law that court is deprived of jurisdiction of that particular cause of action.

But while County Courts stand on the same footing in civil actions as District Courts in all civil matters, and they have concurrent jurisdiction with the District Court in all civil matters, yet as by the Constitution that jurisdiction is limited to the sum of two thousand dollars, there is always a want of jurisdiction of the subject-matter where the judgment of the court is for a sum in excess of two thousand dollars, exclusive of the costs in the action.¹ This want of jurisdiction will appear on the face of the record, for a court of review judicially notices the limitations on the jurisdiction of courts prescribed by the Constitution and laws. But if the amount claimed at the commencement of the action do not exceed the sum of two thousand dollars, such jurisdiction is not ousted by the accumulation of interest during the pendency of the suit. And in the case of *Keystone Mining Co. v. Gallagher* it was held that in mechanics' lien cases, any number of lienors may join in the proceeding, though the aggregate of their claims exceed two thousand dollars, and that the objection of a want of jurisdiction will not be tenable, because the judgments in favor of each claimant is a separate judgment * * * if the claim of no one does not exceed two thousand dollars.²

¹ *Leonard v. Tritch*, 6 Colo. 441; *RR. Co. v. Church*, 7 Colo. 143; *RR. Co. v. Otis*, 7 Colo. 196; *D. C. etc., Co. v. Middaugh*, 12 Colo. 434; *Frue v. Houghton*, 9 Colo. 323.

² *Keystone Mfg. Co. v. Gallagher*, 5 Colo. 23.

When want of jurisdiction of the subject-matter appears by the record, error may be assigned thereon without examining the record to find a consent or a waiver, for consent cannot confer jurisdiction of a cause of action in a case where such jurisdiction is not conferred by some law.¹

This principle has been repeatedly referred to by the Supreme Court in its opinions, and it holds that the objection of want of jurisdiction of the subject-matter may be raised at any time.

But it is different with jurisdiction of the person. If this appears, as it usually will in cases of judgment by default; in cases of the service of the summons by publication, and in many other cases, it will be the duty of the party assigning error to examine the record, and inquire whether any act has been done in his behalf, by which jurisdiction of his person has been given to the court, notwithstanding the apparent want of jurisdiction. Thus, though he may never have been served with a summons, yet if he have appeared in the trial court for any purpose, other than that of objecting to its action, because without jurisdiction of his person, and have there filed a motion, or a demurrer or other pleading to the merits of the action, then the objection of want of jurisdiction of his person is not maintainable, for in cases of jurisdiction of the person the want of juris-

¹ San Juan, etc., Co. v. Finch, 6 Colo. 219; Clayton v. Clayton, 4 Colo. 415; RR. Co. v. Neis, 10 Colo. 56; Reed v. Cates, 11 Colo. 527; RR. v. Caldwell, 11 Colo. 545.

diction may be waived. In such cases consent will confer jurisdiction, and error for want of jurisdiction will not be tenable.¹

It must also be borne in mind that, if the transcript show a general appearance in the trial court by the party who assigns as error want of jurisdiction of his person, the statement of the record cannot be controverted in the court of review, for the record imports verity, and is not to be impeached.

Want of jurisdiction of the person appears, where there has been no service of the summons on the defendant, and no general appearance has been entered by or for him.

Where the certificate of service is attacked the amendment to section 38 of the Code by the act of 1891 must be noted. Under that amendment a defect in the summons or its service, which shall be sufficient to set aside such service as void, must be a defect in substance.

So an objection for want of jurisdiction will lie if the judgment have been entered before the time for answer prescribed by the statute have fully expired.²

In assigning error for want of jurisdiction a distinction must be made between cases where the want of jurisdiction affirmatively appears by the record,

¹ San Juan, etc., Co. v. Finch, 6 Colo. 219; Clayton v. Clayton, 4 Colo. 415; RR. Co. v. Neis, 10 Colo. 56; Reed v. Cates, 11 Colo. 527; RR. v. Caldwell, 11 Colo. 545.

² Conley v. Morris, 5 Colo. 212; Skiles v. Baker, 5 Colo. 295; Brown v. Tucker, 7 Colo. 30.

and cases where the want of such jurisdiction is made to appear by matter *dehors* the record. In the latter case the facts which tend to show want of jurisdiction must have been presented to the trial court, and if the objection be denied, the evidence must be incorporated into a bill of exceptions, with the ruling of the court and an exception thereto properly reserved, and thus brought to the notice of the court of review.

WANT OF FACTS ASSIGNABLE FOR ERROR.

SEC. 117. Having determined the question whether error for want of jurisdiction will lie, the next most important matter to determine is "the sufficiency of the facts stated in the complaint to constitute a cause of action." Error for want of sufficient facts is assignable in the court of review, though not raised in the trial court, but only if an examination of the complaint shows so total an absence of essential facts that no liberality of construction will aid it. If taking all the facts stated in the pleading together, a good cause of action can be gathered therefrom, without regard to the vague or defective manner in which they are stated, the appellate court will construe the complaint liberally, and hold it to be good. If, however, an examination of the complaint shows an absolute omission of some fact or facts which are indispensable to constitute the cause of action, an assignment of error for want of facts may be taken.

Thus, in the case of *Emery v. Yount* it was held that an allegation of "the insolvency of the grantor in an action to set aside a conveyance in fraud of creditors is essential, and that the defect is not cured by evidence establishing such insolvency." But before assigning such error, the pleader should ascertain whether the subsequent pleadings have not supplied the averments wanting in the answer, or whether the defect has not been cured by the verdict of the jury. It is a rule of pleading that where a material averment is omitted in a complaint or answer, and the omitted allegation is supplied in the answer or reply, the omission is cured. Hence, though the complaint be substantially defective, an assignment of error is not tenable, if the defect have been cured in a subsequent pleading.¹ So, if the defect be one which may be aided by the verdict, an assignment of error on that defect would be unavailable where the cause had been tried to a jury.

OTHER ERRORS IN RECORD PROPER.

SEC. 118. If other errors appear on the face of the record, such as error in overruling a demurrer to the party's pleading, such error will not be available, unless the party assigning it for error have stood by his demurrer and refused to plead further. If, when his demurrer is overruled, he file a further pleading,

¹ *Emery v. Yount*, 7 Colo. 109; *Herfort v. Cramer*, 7 Colo. 484; *Hall v. Linn*, 8 Colo. 264; *James v. McPhee*, 9 Colo. 493; *Marriot v. Clise*, 12 Colo. 561.

the rule is inflexible, except where there is an absolute want of jurisdiction of the subject-matter, or a want of sufficient facts, that he thereby waives any error of the court in overruling the demurrer.¹

But error may be found in the ruling of the court in allowing or denying motions which affect the pleadings, etc., made part of the record proper by Code of 1887. The rulings of the court in such cases need not be excepted to, under section 387 of the Code, nor need such motions and rulings or exceptions thereto be preserved by bill of exceptions. In such case but two questions will arise for adjudication; the one, was the ruling an erroneous ruling; the second, was such ruling prejudicial to the party assigning it for error, so as to require a reversal or a modification of the judgment. If both questions can be answered in the affirmative, then the party may assign error thereon. Otherwise an assignment of error thereon will be unavailable for any purpose.

A careful scrutiny of the entire record proper is to be made, so that no material error may be overlooked, since errors may sometimes be found therein of sufficient importance to procure a modification or reversal of the judgment, to which attention was not particularly directed during the trial in the trial court.

¹ Webb v. Smith, 6 Colo. 365; Schoelkopf v. Leonard, 8 Colo. 159; Gale v. James, 11 Colo. 542.

ERRORS APPEARING BY THE BILL OF EXCEPTIONS.

SEC. 119. The practitioner will next proceed to examine the bill of exceptions. In it he will note, *First*. All motions made by either party; the rulings of the court, allowing or denying the same; the exception taken to such ruling, and reserved at the time of such ruling. *Second*. The evidence contained in such bill, offered, admitted or excluded, of both parties; the objections made, and sustained or overruled; that the proper objections were made to the evidence; that the grounds of objection are clearly and distinctly stated in the bill, as hereinbefore pointed out, and that the bill shows that the exception was properly taken, reserved and stated in the bill. Having carefully scanned the contents of the bill, and located therein each particular error found in it, whatever be its nature, which he deems assignable, the same question will arise: Was the error prejudicial to the party he represents? If so, he may assign error thereon. He should, however, see that the error in the ruling, if adverse to him, has not been waived by any act on his part.

MATTERS OF JUDICIAL DISCRETION NOT ASSIGNABLE
FOR ERROR.

SEC. 120. There are many matters occurring during the progress of the trial which rest wholly within the discretion of the trial court, and are not reviewable by an appellate court, unless it appear that the

trial court has been guilty of a gross abuse of discretion, which has resulted in substantial injury to the party complaining.

Thus an allowance of an application to amend a pleading is a matter of discretion. So, also, is the granting or refusal of a continuance or postponement of the trial.¹

So where a continuance was asked, and the adverse party offered to admit that the absent witness would testify as is stated in the affidavit for a postponement of the trial, the granting or refusal of the application is a matter of discretion.

Allowing an answer to be filed after the statutory time for answer has expired, where no default has been taken, is not error.

The terms upon which, and the time within which, an answer shall be filed, after a demurrer to the complaint has been overruled, is a matter of discretion.²

The allowance of the filing of a second appeal bond, when the former one is deemed insufficient, and the admission of evidence in rebuttal, which should properly have been offered in chief, is discretionary.³

So trial courts have a large discretion in awarding or refusing a motion for a new trial, or in denying or

¹ Brown v. Nachtrieb, 6 Colo. 517; Alden v. Campbell, 7 Colo. 87.

² Sieber v. Frink, 7 Colo. 148; Corson v. Natheny, 9 Colo. 215.

³ Commissioners v. King, 9 Colo. 542; McKee v. Mining Co., 8 Colo. 394; Buckingham v. Harris, 10 Colo. 463.

allowing a motion to require plaintiff to give security for costs.¹

Also in allowing pleadings to be amended, when the case is returned to it from the appellate court, and in the amendment of pleadings during the progress of the trial.¹

Hence when assigning error on matters of discretion, it is indispensable that an abuse of discretion be shown, which tends to the injury of the party assigning error, or the error will not be tenable.

ERROR IN SUSTAINING OR OVERRULING A CHALLENGE TO A JUROR.

SEC. 121. When a civil cause is tried by a jury, error may be committed by the court in allowing or overruling a challenge to a juror for cause. But it is necessary to sustain this ground of error, that the sustaining or overruling of the challenge be shown to have been prejudicial. The Code prescribes the grounds on which a challenge to a juror for cause may be allowed. But to sustain error in overruling a challenge for cause, it must appear, from the record, that the requirements of the statute, prescribing what shall be a good ground of challenge, have been disregarded, otherwise the ruling of the court will be sustained. Unless the record shows a gross abuse of discretion in determining the question of enmity or

¹ Cooper v. McKeen, 11 Colo. 41; Cook v. Doud, 14 Colo. 483; Knight v. Fisher, 15 Colo. 176; Horn v. Reitler, 15 Colo. 316; Seymour v. Fisher, 16 Colo. 189.

bias of the juror challenged the appellate court will not review the case on that ground.¹

But the mere fact that the court sustained or overruled a challenge erroneously is no ground of error. If the cause has been tried by a competent jury, against no one of whom any good cause of a challenge exists, no error can be maintained in a civil case. But the rule is somewhat different in criminal cases. In such cases, if the court, by improperly sustaining a challenge for cause, depletes the panel, or list of jurors, which the statute requires shall be furnished each prisoner on his arraignment, and thereby compels the resort to talesmen, error prejudicial to the prisoner is committed.² The reason of this is, that the statute gives the list of jurors to enable the prisoner to inquire into the character, disposition and associations of each juror, and thereby enable him to act judiciously in challenging and excusing jurors. Of this privilege he is deprived when talesmen are called. But the court will not commit error by allowing excuses, or permitting a juror to absent himself, or be excused, if a competent jury can be obtained from the panel or list furnished the accused. The question to be determined in assigning error is did the challenge sustained so deplete the panel as to compel a resort to talesmen?

So error may be committed in overruling a chal-

¹ *RR. v. Moynahan*, 8 Colo. 56; *Collins v. Burns*, 16 Colo. 7.

² *Stratton v. People*, 5 Colo. 276; *Mooney v. People*, 7 Colo. 218.

lenge to a juror, if it clearly appear that he is, for any legal reason, disqualified to sit in that particular case and he does act as a juror in that case. But this must be made to clearly appear, otherwise the presumption, in case of doubt, will be that the court acted correctly. Where the court determines the fact of a juror's indifference on examination on his *voir dire*, such determination is not reviewable on error, and is, therefore, not the subject of an assignment of error.

So a failure to furnish, in a criminal case, to the defendant a list of jurors or witnesses at the time of the arraignment is not error, if such list have been furnished in sufficient time to enable the defendant to have the benefit of it, as the law contemplates.¹

Other errors may be committed in relation to impaneling the jury, but all such errors must appear to have been prejudicial to the party assigning them for error, or the assignment will be unavailable.

ERRORS IN INSTRUCTIONS TO THE JURY.

SEC. 122. The Code provides that "special instructions to the jury shall be reduced to writing, shall be numbered and signed by the attorney who presents them, and be delivered to the court."

On this part of the Code section, error can only be assigned on the giving of instructions orally, as

¹ Solander v. People, 2 Colo. 48; Jones v. People, 2 Colo. 351; Minich v. People, 8 Colo. 448.

the numbering and signing of the instructions is merely directory, and the failure to number and sign can, under no circumstances, be prejudicial.

It is held to be error for the court to verbally direct the jury to find for one of the parties, if there be evidence sufficient to take the case to the jury. In such case the court ought to give proper instructions in writing, and leave it to the jury to decide on the preponderance of the evidence.

It is not error for the court to refuse to give instructions in a civil case, when they are not numbered and signed by counsel as the statute requires, and presented to the court in apt time.

In assigning the giving of oral instructions for error, the party assigning error must see that no stipulation is in the record, by which oral instructions were consented to, as such a stipulation is a waiver of the statutory requirement.¹

The Criminal Code also requires that the instructions be given in writing, but does not require that they be signed by the attorney and numbered, as in the Civil Code. The same decisions, in relation to giving of instructions in writing, will, therefore, apply equally to civil and criminal cases, though the Criminal Code seems to require a request that they be given in writing, and to imply the right to give oral instructions, if written instructions are not re-

¹ *Montelius v. Atherton*, 6 Colo. 224; *Lee v. Stahl*, 9 Colo. 208; *Gibbs v. Wall*, 10 Colo. 160; *Schoolfield v. Houle*, 13 Colo. 394.

quested. But the practice is the same in both classes of cases.¹

Instructions must be based on the state of facts which is developed by the evidence in the case. Hence instructions based on evidence, which has not been properly brought up in the bill of exceptions, are ground for reversal, if they appear to tend to the prejudice of the party assigning error, for the appellate court cannot presume that there was evidence to justify the giving of the instruction. Instructions must also be appropriate to the pleadings and the issues submitted to the jury. Hence it is not error to refuse an instruction, inapplicable to the issues tried.²

Error cannot be maintained as against all the instructions given for either party, unless every one is erroneous, or no one applicable to the case. Hence when assigning error on instructions, error should be assigned specifically to each instruction, which is claimed to be erroneous.

It is further to be noted that where the same principle is stated in several instructions, it is not the duty of the court to give more than one instruction covering the same point in all respects, especially if the giving of both instructions may tend to mislead the jury.³

¹ Mills' Stat., § 1468.

² Lawson v. Van Auken, 6 Colo. 52; Piela v. People, 6 Colo. 343; Rara Avis, etc., Co. v. Bouscher, 9 Colo. 383; Williams v. Mellor, 12 Colo. 1; Hill v. Corcoran, 15 Colo. 270; DeVotie v. McGerr, 15 Colo. 467.

³ McKee v. Mining Co., 8 Colo. 396; Minich v. People, 8 Colo. 456; Boulder v. Fowler, 11 Colo. 396; Dozenbach v. Raymer, 13 Colo. 454; Johnson v. Jones, 16 Colo. 138.

It will sometimes happen that the instructions given are conflicting, but that error may be maintained, it must appear that such conflict may have occasioned prejudice to the party assigning error. If, taking the charge as a whole, it does not appear that the party assigning error is materially prejudiced, error is not maintainable.

It is error for the trial court to assume in his instructions to the jury the existence of material facts, when their existence is in issue and controverted in the evidence.¹

When assigning error on specific instructions, the party must keep in mind the rule adopted by the Supreme Court, that each instruction is to be considered in connection with the entire charge to the jury; and if, taking the whole charge as a whole, the court is satisfied that the jury was not improperly instructed as to any material point in the case, the judgment will not be reversed on account of an erroneous instruction.²

This is on the ground that such erroneous instruction could not have been prejudicial to the party. But an instruction is fatally defective, which contains one correct and one incorrect proposition, respecting the legal effect of the evidence produced on the trial,

¹ Gaynor *et al.* v. Clements, 16 Colo. 209; Overland M. & E. Co. v. Carrol, 7 Colo. 44; Boulder v. Fowler, 11 Colo. 396; Nuckolls v. Gaut, 12 Colo. 361; Patrick, etc. v. Skoman, 1 Colo. App. 323.

² Mining Co. v. Bank, 2 Colo. 565; Thatcher v. Rockwell, 4 Colo. 375; McClelland v. Burns, 5 Colo. 390; Dozenback v. Raymer, 13 Colo. 544.

and tells the jury that if the evidence sustains either proposition the verdict must be for the plaintiff. It renders it impossible to know upon what finding of facts the verdict is based. So where the charge in a criminal case contains one important correct legal proposition, and in another an incorrect and conflicting proposition on the same subject, it cannot be said that the error is avoided, for it is impossible to know upon which proposition the jury relied. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced by such error.¹

Instructions given at the request of the party assigning error cannot be made available to him as an error. But if the instructions asked by him are modified or changed by the court in any material respect he may assign error as to such modification or change.

In regard to assignments of error on instructions the Supreme Court has adopted the following rule:

“When the error alleged is to the charge of the court the part of the charge referred to shall be quoted *totidem verbis* in the specifications of error. But where the charge is divided into separate paragraphs or instructions which are duly numbered as prescribed by the Code, and one or more of such paragraphs is assigned for error, it shall be suffi-

¹ Mackey v. People, 2 Colo. 13; Clare v. People, 9 Colo. 125; Anderson v. Bartels, 7 Colo. 256.

cient in the assignments of error to designate the part of the charge referred to, by giving the number prefixed to such paragraph or instruction assigned for error."¹

Besides the errors above referred to there are many other errors which may be assigned, if properly brought up by bill. The general rule is, that if the error is not found in the record proper, it will not be noticed unless found, properly excepted to, in the bill of exceptions.

The party may assign as many errors as he pleases, but no errors will be noticed by the court where the assignment does not comply with the rules of the court. An *oral* assignment of errors is not permitted. Counsel are restricted to a discussion of the errors which are properly assigned. The court does not, however, usually notice errors assigned, which are not discussed by counsel in briefs and arguments, but treats them as abandoned by counsel. It, however, reserves to itself by rule the right, in its discretion, to notice errors not assigned or discussed in the briefs, and will do so in cases where the error is fatal, though not called to the court's attention by counsel.²

Though the appellate court does not discuss in its opinions all the errors assigned by counsel; all the assignments of error relied upon by counsel in

¹ Rule 13 of Supreme Court.

² Rule 15 of Supreme Court; *Seaton v. Ruff*, 29 Ill. App. 238; *Patrick, etc. v. Skoman*, 1 Colo. App. 323.

the argument of the cause receive the careful consideration of the court. If not alluded to in the opinion, it is either because the assignment is deemed to be without merit, or because the same question has been frequently adjudicated by the court, or because, for some other reason, it does not appear to be important that that question be discussed in the opinion.¹

FORM OF ASSIGNMENT OF ERRORS.

SEC. 123.

STATE OF COLORADO.

*In the — Court.**To the — Term, 18—.*

<i>A — B —, Plaintiff in Error,</i> <i>vs.</i> <i>C — D —, Defendant in Error.</i>	}
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Comes now the plaintiff in error, above named, and says, that in the record and proceedings aforesaid there is manifest error, in this :

First. The trial court was without jurisdiction of the subject-matter, it being the title to real estate, no part of which is situate in the county of —.

Second. The trial court was without jurisdiction of the person of the defendant, it appearing by the record that no service of summons has been had upon him, and no general appearance was entered by or for him.

Third. The complaint filed in the action does not state facts sufficient to constitute a cause of action against this plaintiff in error.

Fourth. The trial court erred in allowing plaintiff's motion for judgment on the pleadings.

Fifth. The trial court erred in denying this plaintiff's motion for a continuance, on the ground of the absence of witnesses whose personal presence at the trial is shown to be indispensable by the affidavits filed and found on folios 20 to 50 of record.

¹ Sellar v. McClelland, 2 Colo. 532; Murphy v. Hobbs, 8 Colo. 130.

Sixth. The trial court erred in overruling this plaintiff's challenge to juror —, his testimony on his voir dire clearly showing him to be incompetent, as found in record, folios —.

Seventh. The trial court erred in admitting the testimony of — over the objection of this plaintiff in error, as shown in record, folios —.

Eighth. The trial court erred in giving instruction No. —, found in record, folio —.

Ninth. The trial court erred in modifying instruction No. —, asked by plaintiff in error, found in folio —.

Tenth. The trial court erred in rendering judgment on the verdict of the jury.

Wherefore plaintiff in error prays this court, that by reason of the several errors aforesaid the judgment aforesaid may be reversed, set aside and hereafter held for naught.

— — —,
Attorney for plaintiff in error.

The rules of the courts require that the assignment of errors be signed by an attorney of the court.

If the assignment be in a case appealed, the party appealing must be designated as the "appellant," and the adverse party as the "appellee."

When the assignment of errors is completed and attached to the transcript, the plaintiff in error will file the transcript in the office of the clerk of the court of review, if it have not been already filed. When it has been filed in the first instance, as is sometimes done, before the assignment of errors is attached thereto, Rule 30 allows the record to be withdrawn by leaving a receipt therefor with the clerk, and retained for eight days, without an application to the court for leave to do so.

CHAPTER VII.

The Scire Facias.

- SEC. 124. Of *scire facias* on writ of error — form of.
125. *Scire facias* — when to be made returnable.
126. Service of *scire facias* by publication.
127. Forms of affidavits.
128. Writs of error amendable.

OF SCIRE FACIAS ON WRIT OF ERROR.

SEC. 124. As a writ of error is held by the Supreme Court to be a new suit, though based on the record of the trial court, and as the defendant in error is not bound to follow the case into the court of review, as he is in case of an appeal from the judgment of the trial court, it becomes necessary to bring the defendant in error within the jurisdiction of the court of review by the service of process upon him. It is essential that he have notice, in some manner provided by law, of the commencement of the proceedings in error, so that he may defend against them if he desire to do so.

Hence the Code provides that,

“In all cases in which a writ of error shall be issued, if the defendant in error have not entered his appearance to the cause in error in

the appellate court, the clerk of the appellate court shall also issue a *scire facias*, or summons in error, to hear errors directed to the sheriff or other officer of the proper county, where the defendant or defendants in error reside or may be found, commanding him to summon the defendant or defendants in error to appear at the next term of the appellate court, and show cause, if any he or they have, why the judgment or decree mentioned in the writ of error should not be reversed."¹

FORM OF SCIRE FACIAS.

The form of the *scire facias* used in the courts of review of Colorado is as follows :

STATE OF COLORADO, }
 — Court. }

*The People of the State of Colorado, To the Sheriff of — County,
 Greeting :*

Because in the records and proceedings, and also in the rendition of the judgment, in a suit which was lately in the — Court of — county, before the judge thereof, between — plaintiff and — defendant, manifest error hath intervened, as it is said, to the great injury of the said —, as by his complaint we are informed; a transcript of which said judgment we have caused to be brought into our — (Court), of the State of Colorado, before the justices thereof, to correct the error in the same, if any there be, in due form and manner, according to law.

We, therefore, command you to summon the said — to be and appear before the justices of our said — (Court), at the next term

¹ Code, § 405.

thereof, to be holden at Denver, in said State, on the second Monday in the month of —, A. D. 18—, to hear the record and proceedings, and errors assigned, if he shall think fit, and show cause, if any he can, why the said judgment shall not be reversed for the causes aforesaid; and further to do and receive what our said court shall order and adjudge in this behalf. And have you then and there this writ, and make return thereon in what manner you execute the same.

Witness the Honorable —, Chief Justice of our said — (Court), and the seal thereof at Denver, this — day of —, A. D. 18—

— —,
Clerk.

Unlike the summons, provided in the Code for other courts of record, the *scire facias* is directed to the sheriff or other officer to serve and not to the defendant in error. It is, however, to be served by him in the usual mode of serving a summons at common law, that is, by reading and exhibiting the original writ to the person served. If, however, the summons be served in the mode designated in the Code, it will seem that no valid objection will lie to such mode of service, since the object of the service, which is to notify the defendant in error of the time and place of the hearing on error, is attained by either mode of service, if the copy of the writ reaches the defendant in sufficient time to enable him to prepare to defend, should he desire to do so.

The Code also provides that:

“Where there are several defendants in error, who reside in different counties, the plaintiff in error may

have separate writs of error issued to each county in which one of the defendants in error resides or may be found " ¹

The rules that govern the service of a *scire facias* are in substance the same that govern the service of a summons as they existed before the adoption of the Code, the Supreme Court not having adopted any rule by which the provisions of the Code, which direct the manner of serving a summons, are made applicable to the service of a *scire facias*. Hence service by leaving a copy at the usual place of residence of the defendant in error, which is authorized by the Code in serving the summons in a case pending in a trial court, does not seem to be an authorized mode of serving a *scire facias*, under either the Code or by any rule of the courts of review. The only service, therefore, which would appear to be sufficient to empower the court to proceed, unless the defendant in error enter his general appearance, is personal service on him. This is the only mode of service authorized by the common law.

If a *scire facias* shall not be served before the return day mentioned therein, an *alias* or *pluries scire facias* may be issued by the clerk on the application of the plaintiff in error, without a previous application to the court for an order therefor. ²

¹ Code, § 405.

² Rule 3 of Supreme Court.

SCIRE FACIAS — WHEN TO BE MADE RETURNABLE.

SEC. 125. A *scire facias*, or summons in error, if issued ten days or more before the first day of the next term of the appellate court, shall be made returnable to the first day of that term. If issued less than ten days before the first day of the next ensuing term, it may be made returnable to any day of that term. No *scire facias* shall be returnable to any Special Term.¹

It follows, therefore, from this rule, that a *scire facias* cannot be made returnable in less than ten days from the date of its issuance, excluding the day on which it is issued. The return day is of importance in connection with the rule requiring the plaintiff to file abstracts of the record. Service on the defendant, however, is essential, before any action in the case can be taken affecting him. Hence the rule further provides that :

“If the writ be not served ten days before the return day thereof, the defendant is not required to appear in obedience thereto, until the first day of the term succeeding such return day.”²

SERVICE OF SCIRE FACIAS BY PUBLICATION.

SEC. 126. There are many cases where the defendant is not a resident of the State at the time of

¹ Rule 2 of Supreme Court, and Rule 38.

² Rule 2 of Supreme Court.

suing out a writ of error, either because he has left the State since the rendition of the judgment, or because, though at the time of the commencement of the action in the trial court he was not domiciled within the State, service was had upon him personally, while found within the State. In case the defendant in error is the defendant in trial court, and it not be possible to obtain personal service of the *scire facias* on him, it becomes necessary to resort to constructive service by publication of a notice in some newspaper. In cases in the courts of review, the Code provides :

“ If the plaintiff in error, or other person for him, shall at any time file in the office of the clerk of the Supreme Court an affidavit, setting forth that the defendant in error, First, has gone out of the State, so that process cannot be served upon him ; or, Second, that he is not a resident of the State ; or, Third, that on due inquiry he cannot be found ; or, Fourth, that he evades service of process ; or, Fifth, that he is concealed within the State ; or, Sixth, that process cannot be served upon him ; it shall be the duty of the clerk to cause notice to such defendant in error to be made in some newspaper published in this State, setting forth the pendency of the writ of error ; the names of the parties thereto ; and the time when the *scire facias* may be returnable, which notice shall be published for four consecutive weeks, and if the first insertion of such notice shall not be at least sixty days before the return day of the writ

of error the cause shall be continued to the next succeeding term of the Supreme Court, and it shall be the duty of the plaintiff in error, or of some one for him, to send postpaid by mail a copy of such notice to the defendant in error, if the place of residence of him shall be known to, or on diligent inquiry can be ascertained by, the plaintiff in error. Upon filing a certificate of the publication of such notice, made by the publisher of the newspaper in which the same shall have appeared, together with an affidavit that copies of such notice have been sent to the defendant in error, as herein provided, or that the residence of such defendant is unknown to and cannot after diligent inquiry be ascertained by the plaintiff in error, the cause shall proceed as if the defendant in error had been personally served with process.¹

Without referring to the duties imposed upon the clerk by the foregoing section, the first duty imposed upon the plaintiff in error, when it becomes necessary for him to obtain service of the *scire facias* by publication, is to file "an affidavit" of himself or of some other person. Such affidavit must state some one of the six (6) causes for which the personal service of the writ is impracticable. The statute requires a positive assertion of the ground on which the publication is to be made, and an affidavit based on information and belief is insufficient.

¹ Code, § 405.

No prior issuing of the *scire facias* is prescribed, as is required in case of a summons, and a return of "not found" thereon, but when the third, fourth, fifth and sixth grounds are relied on, we apprehend that the appellate court will not be satisfied with the bald statement in the words of the section above cited. The court will require a statement of the efforts made by the party to ascertain the whereabouts of the defendant in error, and in such cases it is advisable, if not necessary, to issue a *scire facias* to the sheriff of the county of the State in which defendant in error last resided, with an official return on the writ by him showing what efforts were made by him to serve the writ on the defendant in error. This return ought to be supplemented by an affidavit that defendant last resided in such county, to the knowledge of the plaintiff in error, or sheriff. The statute does not require this to be done, but it seems to be proper, to show good faith on the part of the plaintiff in error. In similar cases under the Code of California, it was held that the affidavit should negative all information on the part of the plaintiff, and where there is more than one plaintiff, on the part of each and every plaintiff, as to where the defendant might be found, and also that plaintiff obtained any knowledge of the defendant's whereabouts from those of whom he made inquiry. Where it is stated in the affidavit that "on due inquiry he cannot be found," it has been held that the affidavit should state the

names of the persons of whom inquiry was made, and should show that they bore such relations to the person inquired for that they would probably be able to make known his whereabouts.¹

If the ground alleged be concealment, such concealment must be for the purpose of avoiding service of the writ. The affidavit should state the facts, so that the court may, from such statement of facts, determine that defendant conceals himself, and that such concealment is for the purpose of avoiding service of the writ.

While the court does not pass upon the sufficiency of the affidavit in the first instance, and the clerk usually accepts the affidavit if it appear *prima facie* sufficient, yet the question may be raised on a motion to quash the notice by publication, because of a defective affidavit. Upon the filing of the affidavit the clerk prepares the notice, and designates the newspaper in which it shall be published. He will usually direct its publication in some paper published in the county in which defendant last resided, if he can ascertain such county from the affidavit. The court will presume that the paper designated by the clerk was the one most likely to give notice to the person to be served or notified.

The statute requires that the notice be published for four consecutive weeks.² This provision does

¹ Braley v. Seaman, 30 Cal. 617.

² "A week" is a definite period of time, commencing on Sunday and ending on Saturday. *In re* Tyson, 13 Colo. 490; *State v. Mining Co.*, 5 Nev. 415; *Ronkendorf v. Taylor*, 4 Pet. 361.

not specify how many times in each week the notice shall be published, but as it is usually published in a weekly paper, it is not of much importance to specify the number of publications in each week. But it has been held, under a similar provision, that where the publication is in a paper published daily, that the notice must be published in every day's issue, during the period of time specified.

The Supreme Court of Colorado, in *Calvert v. Calvert*, holds that the term "weeks" does not necessarily imply four weeks of seven days each, and that when a publication is ordered for four consecutive weeks, it is not necessary that the publication be on the same day in each week.

As the period of sixty days, mentioned in this section, counts from the first publication and not from the last publication, as in case of a summons, the days of the publication do not appear to be of importance.

The next duty imposed on the plaintiff in error is to send a copy of the notice, postpaid, by mail, to the defendant in error, if the place of residence of the defendant in error shall be known to the plaintiff in error, or on diligent inquiry can be found. In order, therefore, to dispense with the duty of mailing a copy of the notice, the plaintiff in error must show, not only that he was at the time ignorant of the place of residence of the defendant, but also that he was unable by diligent inquiry to ascertain such place of resi-

dence. The statute does not prescribe at what time such notice shall be sent, but by analogy with a summons it seems that the copy should be sent at any time at which the plaintiff ascertains the place of residence of the defendant, prior to the filing of the publisher's certificate. The certificate of publication is in the nature of a sheriff's return of service, and so long as such certificate of publication has not been made, the writ is deemed to be in the hands of the party for service. A copy ought, therefore, to be mailed, at any time before the return day of the writ of error, if prior to that day the plaintiff ascertains the place of residence of the defendant. If the plaintiff mail a copy of the notice to the defendant in error, he should be careful to state that "all postage was prepaid" in the affidavit of mailing, since a failure to so state in the affidavit will create a presumption that the postage was not prepaid, and, hence, that the letter containing the notice was never transmitted to its destination by the postal authorities.¹

After the publication of the notice has been duly completed, the plaintiff will then procure from the publisher of the newspaper a certificate showing the date of the first publication of such notice, and that it was published in his paper for "four consecutive weeks," by stating the first and last publication thereof. While the statute requires the certificate of

¹ Calvert v. Calvert, 15 Colo. 390; Morton v. Morton, 16 Colo. 358; Brown v. Tucker, 7 Colo. 30; O'Rear v. Lazarus, 8 Colo. 608.

the publisher, it is held sufficient that the certificate be made by a clerk or other person in the employ of the publisher, who makes the certificate by authority of the publisher.¹

In relation to constructive service by publication, the Supreme Court of Colorado, in *Bekett v. Cuenin*, 15 Colo. 284, says :

“It is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be successively and accurately taken in order to confer on the court jurisdiction over the defendant.” The record must show affirmatively the taking of each step prescribed by the statute, successively and accurately.

The copy of the notice and certificate of service are then filed in the clerk's office, and thereupon the proceedings in error are prosecuted in the same manner as if the *scire facias* had been personally served on the defendant. The filing is necessary to show that court has jurisdiction.

¹ This certificate must be verified by the oath of the person who makes it for the publisher, and who must have personal knowledge of the fact of publication, stated therein. The affidavit is to be attached to a copy of the published notice.

FORMS OF AFFIDAVITS. ·

SEC. 127.

STATE OF COLORADO

*In the — (Court).**To the — Term, A. D., 18—.**(Title of cause.)*

A. B., being by me first duly sworn, on his oath says, that he is the plaintiff in error (or, the attorney for the plaintiff in error), and makes this affidavit for the purpose of procuring service of notice by publication on defendant in error of the pendency of these proceedings in error; that defendant in error for some time past has resided at —, in the State of —, and is not at this time, to the knowledge or information of affiant, within the State of Colorado, for which reason personal service of the scire facias cannot be made upon him.

Or, that C. D., one of the defendants in error at the time of the proceedings in the trial court in the above cause, was a resident at —, in the State of Colorado, but since that time has removed therefrom, and has gone out of the State of Colorado, but that affiant has been unable to ascertain where he now resides; that E. F. and G. H., residents at that place, were intimate personal friends (or, are near relatives) of said defendant in error, and that this affiant has repeatedly made inquiries of them, as the persons most likely to know where he now resides, and that each of the said persons denies any knowledge of the present residence of said defendant in error; that affiant knows of no other persons who are or may be able to give him information as to the present residence of defendant in error.

Or, that this affiant, on the — day of —, A. D. 18—, caused a writ of scire facias to be placed in the hands of the sheriff of — county, in the State of Colorado, that being the county in which the said defendant in error last resided, to the knowledge and best information of affiant; and that said sheriff has made a return on said writ: "Not found;" that affiant is informed by said sheriff that he has repeatedly, while said writ was in his hands for service, called at the usual place of abode, and usual place of busi-

OR, *did deposit said sealed letter in a United States postal letter box in the said city of Denver, as authorized by the U. S. postal laws.*

Subscribed and sworn to, etc.

It is to be noted here, that the statute does not impose on the clerk of the court of review the duty of mailing the notice, as it does in the cases of service by publication in cases pending in trial courts. The mailing may, therefore, be done by any competent person, and his affidavit of such mailing, if full and satisfactory, will be sufficient proof of a compliance with the requirement of the statute in that respect.

WRITS OF ERROR AMENDABLE.

SEC. 128. All writs of error shall be amendable, and all writs of error, wherein there is any variance from the original record, or any other defect, may be amended and made agreeable to such record by the respective courts to which such writs of error are returnable.¹

These errors can occur only when the writ of error is issued before the transcript of the record is procured and filed in the appellate court. They are usually errors in the names of the parties, errors in the term of the trial court, and such like defects. The duty of seeing that these errors are duly corrected lies upon the plaintiff in error, as the defendant in error can only reach them by attacking the *scire facias* and has nothing whatever to do with the writ of error.

¹ Code, § 406.

CHAPTER VIII.

Procedure by the Defendant in Error.

- SEC. 129. Appearance, entry of.
130. Of motions.
131. Procedure on motions.
132. Motions must be made in apt time.
133. Motion to dismiss writ of error.
134. Pleas before joinder in error.
135. The joinder in error.
136. Of cross-errors.
137. Supplemental transcript of the record.
138. Suggestion of diminution of the record.
139. Special pleas to the assignment of errors.
140. The issue made by the joinder in error.
141. Of reversible errors.
142. Instances of reversible error.
143. Non-reversible errors, because raised in appellate court in the first instance.

APPEARANCE — ENTRY OF.

SEC. 129. A defendant in error, upon whom the writ of *scire facias* has not been served, may enter his appearance to the proceedings in error, and upon *five* (5) days' notice to the plaintiff in error, may proceed as if he had been duly served with the *scire facias*.¹

This rule of the Supreme Court is intended to apply to a "general appearance" by the defendant.

¹ Rule 2 of Supreme Court.

It is intended to substitute the entry of appearance for the service of the *scire facias* on the defendant, if the writ have been issued. If no writ have been issued, such entry of appearance will be a waiver of the issuance of the writ.

The appearance of a defendant in error may be either general or special.

A special appearance is that appearance which the defendant makes to the proceeding in error, for the sole purpose of calling in question, by motion, the rightfulness of the action of the court in its attempt to exercise jurisdiction, either over the subject-matter or over the person of the defendant, by reason of a defect or irregularity in the method of procedure in the case.

As in all other courts, a person entering a special appearance in the court of review must expressly limit his appearance to the sole purpose of the specific motion and no other. Thus, a motion made for the specific purpose of procuring a dismissal of a writ of error because it is brought after the expiration of the time limited by statute for bringing it, may also be based on the further ground that the party who brings the writ has waived his right to bring error, by matter appearing on the record, or other good grounds for asking such dismissal. If, however, he ask any action of the court looking to any thing else except dismissal, he will be held to have entered a general appearance.

A general appearance is a voluntary submission to the authority of the court for all the purposes of the action or proceeding, with a view to its determining any and all questions which may properly arise therein and require its determination thereof.

The effect of the entry of appearance is to waive only the issuing and service of the *scire facias*, and all errors, defects or irregularities that may be in the writ, or have occurred in its service.

The defendant in error is not compelled to proceed at an earlier date than he would have been required to proceed had the *scire facias* been actually served on him. He may do so if he so elect, but he cannot be required by the court to do so before the prescribed time. Thus, he will have fifteen days from the day of entering his appearance to join in error, and cannot, against his consent, be ruled to join in error at an earlier day. The entry of appearance has the same and no other effect than the service of the *scire facias* on him would have, except that it precludes the consideration of any questions affecting the sufficiency of the *scire facias*, or of its service, if it have been served. It also precludes his raising any questions affecting the jurisdiction of the court over his person, as by a general appearance he submits his person voluntarily to the jurisdiction of the court for all the purposes of that proceeding.¹

¹ Callahan v. Jennings, 16 Colo. 471 ; Whale v. Fuller, 1 H. Blackstone, 222 ; Code, §§ 379-44.

The five (5) days' notice provided by the rule is a notice to the plaintiff in error that the defendant has entered his general appearance to the proceeding in error. This he may do before the *scire facias* is issued, or before it is served. The effect of such entry of appearance is a full submission and recognition of the jurisdiction of the court of review over his person, and it has the same effect as to jurisdiction of his person as if the *scire facias* had been duly and legally served on him. The notice to the plaintiff should be in writing and served by copy. Its effect will be merely to notify the plaintiff that the defendant in error is in the court for all purposes, and ready to take proper action on his part.

In case of a special appearance such a notice will not be required as the notice of motion, for the purpose of which the special appearance is entered, will be sufficient.

The appearance may be entered in writing in the following form:

(*Title of cause.*)

I, the above-named defendant in error, do hereby enter my appearance to the above entitled proceeding in error.

Dated ———,

———, ———,

Defendant in error.

This when properly executed, signed and dated should be filed with the clerk of the court of review, in which the proceeding in error is commenced, who will indorse a file-mark thereon, and thereafter the

notice prescribed by the rule may be served. If, however, the defendant join in error on the record as required by the rules, that is a complete general appearance, of which the plaintiff in error must take notice. In such case no entry of appearance other than the joinder in error is to be made. If a special appearance only is entered, the defendant must not join in error until after the questions raised, for which the appearance is restricted, have been determined by the court.

OF MOTIONS.

SEC. 130. After the plaintiff in error has filed his transcript of the record and assignment of errors in the court of review, and the *scire facias* has been issued and served on defendant in error, or defendant has entered a general appearance to the proceeding in error, the defendant is required by the rules to join in error within fifteen days after the return day of the *scire facias*, or entry of appearances.

But the writ of error may have been improperly brought, or there may be defects in the transcript, or in cases of appeals the appeal bond may be defective or insufficient, or the appeal may have been improperly allowed, or there may be a non-joinder or misjoinder of parties, or other defects that the defendant in error should bring to the attention of the court, and procure their correction before joinder in error, or he will be deemed to have waived them.

All such applications are made by "motion." By rule of the Supreme Court all motions shall be in writing; that is, the motion and the grounds upon which the motion is based must be reduced to writing.¹

PROCEDURE ON MOTIONS.

SEC. 131. The procedure on motions is substantially the same as the procedure on motions in other courts of record. The written motion, assigning the reason for which the party makes his application to the court for the relief asked thereby, should be properly entitled in the court and the cause; should state specifically what order of the court it applies for; the grounds on which such application is based, and be signed by the attorney of the party who makes the application. If the attorney of the adverse party have entered his appearance, a written notice of the filing of such motion and of the time when it will be called to the attention of the court, with a copy of the motion, is served on the adverse party or his attorney, at least twenty-four hours before the time therein designated for hearing it. When the motion is made *ex parte*, as a motion for leave to file some omitted paper, or for some action of the court, not affecting the rights of the adverse party, and in cases wherein the adverse party has entered no appearance, notice of the motion is not required. No motion by the defendant in error, which attacks the writ of error,

¹ See chap. on "Motions," *post*.

will be entertained by the court. The only parties to that writ are the plaintiff in error and the clerk of the trial court. The defendant in error has no concern with that writ.¹ He may move to dismiss the proceeding in error, but he cannot call in question the sufficiency of that writ in any respect.

At the first public sitting of the court, after the filing of the motion, application is made in open court by the party who files the motion, for its action thereon. This action by the applicant is indispensable, for the presence of the motion on the files of the court does not require the court to notice the same, or make any order in relation thereto, unless the applicant make an oral application for its action, during a public sitting. If such application be not made, the motion will be considered as withdrawn.² Motions are usually heard by the court at its public sittings, after the announcement of its decisions on cases submitted for final hearing, and its rulings on motions theretofore heard.

When motions are based on matters which do not appear on the face of the record, the motion should be supported by affidavits, which should be filed with the clerk, and copies of them be served on the adverse party.

Motions do not ordinarily suspend the operation of the rules as to filing abstracts and briefs. If an ex-

¹ Rule 29 of Supreme Court; *Vance's Heirs v. Maroney*, 3 Colo. 298.

² *People v. Ah Sam*, 41 Cal. 650.

tension of time for filing abstracts or briefs be necessary, by reason of the motion, such extension of time must be asked and allowed by the court or one of the justices thereof.¹

MOTIONS MUST BE MADE IN APT TIME.

SEC. 132. It is a general rule that motions and objections must be made in apt time, or the objections on which the motion is predicated will be deemed to have been waived. Thus, where a motion was made to strike from the record a bill of exceptions, after the parties had joined in error, the Supreme Court denied the motion, holding that the objection to the bill of exceptions had been waived by the failure to make the motion before joining in error. So where it was contended that the Supreme Court ought not to consider the testimony, because it had not been brought up by a proper bill of exceptions, it was ruled that the objector not having made a motion to strike out the objectionable part of the record before joining in error and submission of the cause, the objection was waived.²

It is, therefore, important that all objections of such a nature that a failure to make them in apt time will be treated as a waiver of them, should be made before joinder in error.

¹ Rule 24 of Supreme Court.

² *Central v. Wilcoxon*, 3 Colo. 570; *Learned v. Tritch*, 6 Colo. 579.

OF MOTIONS TO DISMISS WRIT OF ERROR.

SEC. 133. The first motion in order, which the defendant in error may make, is a motion to dismiss the writ of error. The grounds on which a motion to dismiss will lie are :

First. When a writ of error does not lie. Thus no writ of error will lie if the judgment complained of be not a final judgment. See *ante*, pp. 86-89.

So where the legislature had abolished the writ of error, and substituted an appeal as the sole procedure by which a judgment might be reviewed, no right to sue out a writ of error existed during the existence of that law. Afterward the legislature passed an act reviving the right to a writ of error, and under the latter act a writ of error was sued out to a judgment, rendered while the provision abolishing the writ of error was in existence. It was held that as the right of appeal had lapsed under the then existing law, and as no right to a writ of error then existed, the legislature could not by an *ex post facto* law give a right to a writ of error, in cases where the right did not exist at the time of the rendition of the judgment.

So it is held that a right to a writ of error in favor of the heirs of a deceased party does not exist, where the real estate of the ancestor and the property rights of the heirs therein are not affected by the judgment rendered against the ancestor.

So, in an unpublished decision, very recently made by the Supreme Court of Illinois, it is held that, in a criminal case, the legal representatives of a plaintiff in error cannot maintain a writ of error to reverse the decision of the trial court, however erroneous or unjust it may be, if the plaintiff in error die after the suing out of the writ of error, and that of necessity, under the strict rules of law governing such cases at common law, the writ of error will abate and the judgment of the trial court remain in full effect. Under this ruling it follows that the legal representatives of a deceased party to a judgment in a criminal case cannot be made parties to or sue out a writ of error in such a case.

So where the court set aside a judgment of a prior term, on motion made at a subsequent term, it was held that such order was not a "final judgment." Hence no writ of error will lie thereto.¹

A *second* ground for a motion to dismiss the writ of error is :

That the time prescribed by the statute for bringing a writ of error has expired. Thus in the case of Clayton v. Cheely *et als.* a writ of error was sued out on February 24, 1880, to a decree of the Gilpin County District Court, rendered at the April term, 1868. As the statute then required the writ to be sued out within *five* years from the date of the judg-

¹ Higgins v. Brown, 5 Colo. 345 ; Willoughby v. George, 5 Colo. 80 ; Willoughby v. George, 4 Colo. 22 ; Clayton v. Cheely, 5 Colo. 537c.

ment or decree, it was held that her right to a writ of error was clearly barred by the lapse of time,

So in the case of Webster, Assignee, v. Gaff *et al.* the decree complained of was rendered May 22, 1878. The controversy related to real estate belonging to a person who had been declared a bankrupt, under the then existing Bankrupt Law of the United States, and involved property of the bankrupt, which was vested by his bankruptcy in his assignee in bankruptcy. The Bankrupt Law prohibited the bringing of any such suit in any court, unless the suit was commenced within two years. As a writ of error is held to be a new suit, the failure to sue out a writ of error within two years was held to be fatal.¹

A *third* ground for a motion to dismiss the writ of error is :

When by some matter, which appears on the face of the record, the party who sues out the writ of error has waived the right to have the judgment reviewed by writ of error. But the motion will not be maintainable unless the record show such waiver *affirmatively*. Thus, where it was contended that the successful party to the judgment had subsequent to the judgment availed himself of the benefit of the judgment, and such fact not appearing on the face of the record, it was held that a motion to dismiss would not lie.²

¹ Clayton v. Cheely, 5 Colo. 337; Webster v. Gaff, 6 Colo. 275.

² Atkinson v. Tabor, 7 Colo. 195.

A *fourth* ground for a motion to dismiss a writ of error is when the judgment is not in excess of *two thousand five hundred* dollars, and is not within the exceptions mentioned in the statute. In such case if the writ of error issued out of the Supreme Court, a motion to dismiss the writ will lie since the Supreme Court will not have jurisdiction under the act of 1891, and the writ ought to have been sued out of the Court of Appeals.

A motion to dismiss for want of jurisdiction, by reason of the amount involved, will not usually lie in the Court of Appeals, since that court does not seem to regard the \$100 limitation, imposed by the Code, before the institution of that court, on the Supreme Court as applying to the Court of Appeals, under the act of 1891.

OF PLEAS BEFORE JOINER IN ERROR.

SEC. 134. There are also various pleas, which should be interposed before the defendant joins in error. They are such as pleas of a release of errors; pleas of a waiver to have a review of the judgment by a writ of error; pleas attacking the right of a person who sues out a writ of error, after the expiration of three years from the date of the judgment, on the ground that he was under disability by the statute at the time of the rendering of the judgment, and pleas of a similar nature. These pleas should be interposed at as early a period as possible as they, if successful,

will prevent the necessity of joining in error. Many such objections, if not interposed prior to the joining in error, will be waived by such joinder, as a joinder in error is a general appearance.

OF THE JOINDER IN ERROR.

SEC. 135. If the defendant have no preliminary motions or pleas to make, which he regards as maintainable, the next step for him to take is to join in error. As the assignment of errors fills the place of the complaint in the trial court as plaintiff's pleading asserting the existence of reversible error in the record, so the joinder in error takes the place of the defendant's answer, and is a general denial of each and every assignment of errors. No other pleading is permissible, except a confession of all or some one or more of the errors assigned, to the assignment of errors. Defects in the mode of assigning errors are reached by motion.

If not postponed by reason of some motion or plea, the effect of which will prevent the necessity of joining in error, the rules require that the defendant join in error within *fifteen* days after the first day of the term at which the *scire facias* is returnable, unless on application to the court or by a written stipulation, or by stipulation entered into in open court, further time is given to join in error.

FORM OF JOINDER IN ERROR.

(*Venue and title of cause.*)

Comes the defendant in error above named and says that there is no error, either in the record or proceedings, or in the giving of the judgment, as is by the plaintiff in error alleged in said assignment of errors. Wherefore he prays that said judgment be in all respects affirmed, etc.

_____,
Defendant in error.

A joinder in error being a full appearance by the defendant in error, he is thereafter entitled to notice of every subsequent proceeding by the adverse party.¹

If the defendant fail to join in error the cause in error is liable to be heard *ex parte*, or the judgment or decree may be reversed without a hearing, in the discretion of the court, under Rule 14.¹

OF CROSS-ERRORS.

SEC. 136. Prior to the act of 1889, it was not permitted to assign cross-errors, except by special leave of the court, on application made therefor. But by the act of 1889, "The appellee or defendant in error may assign cross-errors on the record filed by the adverse party, and such errors shall be heard, and the decision rendered thereon at the same time that the cause is considered on the errors assigned by appellant or plaintiff in error."

There are sometimes cases where both parties are dissatisfied with the judgment rendered, and before

¹ Code, § 379.

the passage of the above act, they were obliged to either appeal or take a writ of error, necessitating two appeals or writs of error. By the above provision, both parties may now assign errors, and have the cause wholly determined in the one proceeding.

If an appellee, or defendant in error, be not satisfied with any ruling or decision of the trial court, he can only call such decision in question on appeal or writ of error by the other party, by assigning such decision as error, provided he have preserved a proper exception, where a bill of exceptions is required, on an assignment of cross-errors by him. Thus, in criminal cases, the only mode by which the prosecution may procure a review of the rulings of the trial court, which it believes to be injurious to the people, in a case, is by assigning cross-errors when the convicted defendant takes the judgment to the court of review on writ of error. But to do this he must have properly preserved his exceptions by a bill of exceptions in the case and ask special leave to assign cross-errors, as the Code does not apply to such cases.

In assigning cross-errors the party proceeds in the same manner as the plaintiff in error files his assignment of cross-errors, and the plaintiff in error joins in error thereon.

The joinder in error, whether on the original assignment, or on the assignment of cross-errors, forms the issue to be tried by the court. This is an issue of law only, and is tried by the record as filed in the

court of review. The court takes no notice of any matter whatever, outside of the matters found in the transcript, except such matters as it is bound to judicially notice. Additional averments or evidence cannot be supplied or added to the record filed. The appeal or writ of error is determined on that record, and the only judgment which the appellate court can render is an affirmance, a modification, or a reversal of the judgment contained in that record.¹

SUPPLEMENTAL TRANSCRIPT OF RECORD.

SEC. 137. In the proceedings thus far on error, it may be discovered that portions of the record, as it exists in the trial court, which are necessary to a full and fair investigation and decision of the matters assigned for error, either in the principal assignments of error, or the cross-errors, have been omitted from the transcript, filed in the appellate court, or have been incorrectly transcribed therein. In such case it will become necessary for the party interested, either plaintiff or defendant in error, to procure a supplemental transcript of the parts of the record omitted or incorrectly copied, and have them added to and made a part of the record in the court of review. The Supreme Court has provided the following (Rule 11) on this subject:

¹ Code of 1889, § 386; Hall v. Rockwell, 8 Colo. 103; Luthe v. Luthe, 12 Colo. 430; Tabor v. Clark, 15 Colo. 434.

- “When a party to any cause in the appellate court asks leave, without suggesting a diminution of the record, to file an additional or supplemental transcript of the record, he shall give twenty-four hours’ notice of such application to the adverse party. At the time of filing such motion, and giving such notice, he is required to lodge the additional or supplemental transcript with the clerk of the appellate court for inspection by the adverse party. If, upon hearing the motion, leave to file the same is granted by the court, the supplemental or additional transcript may be filed. It will then be considered in connection with the original transcript.”

The above rule evidently contemplates that the party who desires to procure leave to file an additional transcript, first procure from the clerk of the trial court such transcript. In ordinary cases it will not be necessary to make application to the trial court for the transcript. But if an amendment or correction of the record of the cause or the supplying of any omission in the record become necessary to make the record speak the truth, an application to the trial court must first be made, on notice to all parties adversely interested, and an order be made by the trial court supplying the omission or correcting the error. A transcript of such proceedings will then be procured from the clerk of the trial court, duly authenticated by him, and be lodged with the clerk of the court of review out of which the writ of

error issued. The party seeking leave to file it will then serve a written notice on the attorney who represents the adverse party, or on the adverse party, if no joinder in error has been had, or no attorney has entered an appearance for him, stating that he has lodged the additional or supplemental transcript with the clerk for his inspection, and that on a day therein named he will apply to the court for leave to file the same as part of the record in the cause. At least twenty-four hours' notice is required, and the notice should be served by copy, and the original, with an affidavit showing due service thereof, or an acceptance of due service by the adverse party indorsed thereon, should be filed in the court. On the day appointed for hearing the motion, if no objection to the filing is made, the court will order that it be filed, and be considered as part of the record. But this order is not made of course, unless the court can see that the matters contained in the additional transcript are necessary or proper to the consideration of the errors assigned.

A supplemental or additional transcript is proper in cases where there is an omission of some part of the record, when the omitted portion is necessary to enable the court to pass understandingly on the errors assigned, and render a correct decision thereon. It is also necessary, when it appears by the transcript filed that orders and the action of the court has been incorrectly entered of record, and it is desirable

to have the errors corrected by the action of the trial court.

A supplemental transcript is also required when proceedings in the action after the rendition of the original judgment have been had, which it is sought to have reviewed in the court of review as is now permitted by the act of 1889.¹

A writ of *certiorari* is not necessary to bring up an amended, additional, or supplemental transcript. The party procures it of his own motion, and then proceeds as is prescribed by Rule 11.

The supplemental or additional transcript should be obtained at as early a period in the proceeding as possible, after its necessity is ascertained, but leave to file a supplemental record will be given by the court, even after the cause has been submitted, if the filing of such supplemental record be essential to a proper review of the case. In some cases also leave will be given to file additional errors, based on the additional record, if it be necessary to do so, to reach a proper decision. See (*ante*) "Where record is defective," p. 129, and "Of procuring an amended bill of exceptions," section 120, *ante*.

SUGGESTION OF DIMINUTION OF THE RECORD.

SEC. 138. Rule 11 practically dispenses with any necessity for suggesting to the court a diminution of

¹ *Woffley v. Mining Co.*, 3 Colo. 296; *Knox v. McFerran*, 4 Colo. 348; *Pleyte v. Pleyte*, 14 Colo. 593.

the record, which is a more formal mode of procuring an amended transcript. But it does not abolish that mode of procedure, the two being concurrent remedies for curing a deficiency in the transcript filed in the court of review, and either may be resorted to in proper cases.

A suggestion of a diminution of the record is an assigning of special deficiencies which are alleged to exist in the transcript of the record on file, in which the transcript varies from the record as it exists in the trial court.¹

As a general rule it is not permitted to make a suggestion of a diminution of the record after a joinder in error by the defendant in error.

But it is also a general rule that a court of review, at any time either before or after a joinder in error, may, in its discretion, award a *certiorari* (the object for which a suggestion of a diminution is made), to bring up a more perfect record, when it is advised that the transcript before it is vitally deficient, in regard to the matters on which error is assigned, and that such deficiencies do not exist in the record of the trial court.

This is, however, a matter wholly discretionary, and in awarding a *certiorari*, the court will have regard to the party who makes the suggestion, and award it more readily in the case of a defendant in error than

¹ Tidd's Pr. 1824; Martin v. Force, 3 Colo. 199; Stebbins v. Anthony, 5 Colo. 342.

in the case of a plaintiff in error, since it is especially the duty of the latter to bring up a correct record, and if the record filed is deficient, it will be through fault or neglect on his part. The court is guided by the same principle, when it acts under Rule 11, in allowing an additional or supplemental transcript to be filed, that is, unless the additional transcript be indispensable to enable the court to review the record understandingly, and with due regard to the substantial rights of all parties, it will permit the supplemental transcript to be filed only on a showing of no want of due care on the part of him who asks leave to file it.

Another important rule is that a suggestion of diminution, or leave to file, will not be entertained, if sufficient error appear in the transcript on file to require a reversal of the judgment, unless it be made to appear that in the omitted portion of the record it affirmatively appears that the error was corrected by the trial court at a subsequent period of the trial, or that the party alleging the error has legally waived such error by his subsequent action in the cause in the trial court. The court does not inquire into the materiality of the alleged deficiency in the record, on a suggestion of diminution.¹

¹ 1 Leon. 22; 1 Salk. 269; 2 Ld. Raymond, 1005; 2 Bac. Abr. 205; Jones v. Caruthers, 1 Colo. 291.

FORM OF SUGGESTION OF DIMINUTION.

STATE OF COLORADO.

In the — Court.

<p>A — B —</p> <p>vs.</p> <p>C — D —.</p>

Now comes A. B., above named, and suggests to the court here, that in the transcript of the record returned in the above-entitled cause from the — Court of — county, there are the following deficiencies, viz.: (here set forth specifically the papers, such as affidavits, motions, etc., which have been omitted from the transcript on file.)

Wherefore the said A. B. prays this honorable court to issue its writ of certiorari to said court, commanding the clerk thereof to certify to this court a true and correct transcript of the record and proceedings, as they now remain in said court.

A. B.,
by —, his Attorney.

SPECIAL PLEAS TO ASSIGNMENT OF ERRORS.

SEC. 139. Besides the joinder in error, which is a denial of all error in the record, defendant may plead special pleas, such as a release of errors, the statute of limitations, etc. If it appear on the face of the record that the writ of error has been brought after the expiration of the time within which the writ of error is required by law to be brought, and there is no claim by the plaintiff in error that he is within any of the exceptions of the statute, a motion to dismiss the writ of error is the proper procedure under the Colorado practice. But if the claim is that the plain-

tiff is within a saving clause of the statute, the proper procedure is to plead the statute of limitations, to which the plaintiff can reply the saving clause of the statute, and have the question determined on argument or trial of the issue on the plea.¹ When a release of errors, either by a formal release, or by subsequent action, which is in law a release of errors, is relied on, a formal plea of release of errors is required. This plea is traversable.

A release of errors by one of several defendants, when the error affects only that defendant, is good so far as his interest is involved. But when the error affects all the defendants, a release by one of the defendants, unless made for and on behalf of all the defendants, is no bar to the prosecution of the writ of error by the other defendants.

But where several plaintiffs have judgment against the defendants, a release of errors by one of the plaintiffs is a good bar to a writ of error to that judgment by the other plaintiffs. A party cannot release any error which does not affect himself personally.

The payment by a defendant of the money before execution issued on the judgment, to prevent the accumulation of costs, interest, etc., does not operate as a release of errors. But the acceptance of the money by the plaintiff in the trial court is a release of any errors in the judgment as against him, and prevents

¹ Willoughby v. George, 5 Colo. 80.

his maintaining error thereon. The error still exists, but his release of it precludes him from availing himself of such error to secure its reversal.

A replication to a plea of release of errors, which alleges that said release was obtained by fraud, must set out the facts which constitute the fraud.¹

FORM OF PLEA OF RELEASE OF ERRORS

STATE OF COLORADO.

In the — Court.

To the — Term, 18—.

(Parties to writ of error.)

Comes the defendant in error above named, by —, his attorney, and says that prior to the commencement of the proceedings in error, in this cause, the plaintiff in error above named, at the county of —, and State of —, on the — day of —, A. D. 18—, for a valuable consideration then and there to him paid and by him accepted and received, duly executed and delivered to this defendant in error, an instrument in writing, under his hand and seal, wherein and whereby the said plaintiff in error, for the consideration therein named, released any and all errors in the record and proceedings in this cause in the trial court so far as he is or may be affected thereby, which said instrument in writing is here ready to be produced to the court.

— —,
Attorney for Defendant, etc.

THE ISSUE MADE BY THE JOINDER IN ERROR.

SEC. 140. The issue made by the joinder in error is always an issue of law for the court, to be determined by the facts as found in the transcript of the record brought up from the trial court. A court of

¹ Com. Digest, tit. Pleader, 262; Story Pl. 372; Hendrickson v. Vanwinkle, 21 Ill. 274.

review can take judicial cognizance of no matter of fact, unless such matter is found in the record. The matters therein stated import absolute truth, and cannot be controverted, or an issue as to the truth thereof made, in the appellate court on evidence outside of the record itself. If the record does not speak the truth, a correction thereof must be sought in the trial court. It cannot be corrected by the court of review.

The questions presented to the appellate court for its investigation and determination are :

First. Is there apparent in the record, filed in the court of review, any error that appears to be material and substantial ?

Second. Does such error affect a substantial right of the party who assigns such error ?

Third. Does such error require the court to reverse or modify the judgment of the trial court ?

The court of review can only affirm, modify or reverse the judgment of the trial court, on the record, as it is filed in the appellate court ; and the latter has no authority to go outside of that record.

OF ERRORS, FOR WHICH THE COURT OF REVIEW WILL MODIFY OR REVERSE.

SEC. 141. There are three classes of cases reviewable on error by a court of review.

The *first* class is where the proceedings in the trial court are so fundamentally wrong that the judgment

may be wholly disregarded and ignored by the defendant as a judgment against him, even in collateral proceedings, because it is absolutely void. In such cases, notwithstanding this fact, the judgment may properly be reviewed on error, that the nullity of the judgment may be judicially declared.

Thus, where the trial court has not by law jurisdiction of the subject-matter of the action, yet if it proceeds to a trial and adjudication thereof, with the consent of all parties, or without their consent, its judgment will be absolutely void for the want of jurisdiction of the subject-matter. But as a rule the judgment of a court of general jurisdiction will not be held to be void, unless it appears beyond question, from the record and the law of the State, that it can have, under no circumstances, jurisdiction of the subject-matter. The presumption, however, is in favor of its jurisdiction, and that presumption is to be overcome by the record alone.

Thus, if a judgment be rendered in a County Court for a sum exceeding two thousand dollars, exclusive of interest and costs, in an original case in that court, or for a sum in excess of three hundred dollars, exclusive of interest and costs, on an appeal thereto from the judgment of a justice of the peace, the judgment will be absolutely void.

Want of jurisdiction of the person of the defendant is equally as fatal to the judgment as is a want of jurisdiction of the subject-matter. If the record

show that no summons whatever was served on the defendant, in some one of the various modes prescribed by the statutes, and that no general appearance was entered by or for him in the trial court, by some person duly authorized, the record affirmatively shows a want of jurisdiction of his person, and the judgment is for that reason absolutely void. This is elementary, and no citation of authorities is necessary on this point.

If, however, the records show due service of process on the defendant, or one of them, if there be several, the record on error is conclusive against the person served, and the jurisdiction of the court cannot be questioned by him in that proceeding. If it state that which is not the fact, either because the summons was not served at all, or because it was in fact served on a different person who bears the same name, the remedy must be sought in the trial court by motion or suit in equity.

Hence, when the error assigned is that the trial court had not jurisdiction, the court of review is governed by the presumption of jurisdiction, which attaches to every court of general jurisdiction, and will make a careful examination of the record to see if that jurisdiction is found to exist, unless it is clearly apparent that the trial court could, under no circumstances, have jurisdiction. If the error assigned be want of jurisdiction of the person, the entire record will be carefully searched to see if, at any point

during the proceedings prior to final judgment, the party assigning error has done any act or thing which in law is held to be the equivalent of a full general appearance to the action in the trial court. If such a general appearance be found in the record, the failure to issue or serve process will be deemed to have been waived, and the error assigned, "want of jurisdiction," will be declared not to be tenable.

A *second* primary question for the determination of the court of review is the error, when assigned, that the complaint "does not state facts sufficient to constitute a cause of action against the defendant." This error is a fundamental one, and the court will take notice of it, *sua sponte*, when it becomes necessary to do so. But in considering the question of the sufficiency of the facts, the court disregards all imperfections of statement, gives the most liberal possible construction to the pleading, and will presume in favor of its sufficiency, especially when the trial court has ruled that it is sufficient. If the assignment of insufficiency be made for the first time in the court of review, the assignment of error will be sustained only when the facts, though well stated in the pleading, constitute no cause of action against the defendant. If by any possible construction, disregarding all imperfections of statement, a cause of action against the defendant can be spelled out of the facts stated in

the complaint, the court will decide against the assignment of error.¹

The foregoing two errors are the only errors which are permitted to be assigned for the first time in the appellate court. All other matters on which error is assigned must be first mooted in the trial court or they will not be noticed by the court of review.

Other errors in the record proper, as now established by the amendments to the Code, are errors in allowing a motion for a judgment on the pleadings, or in disallowing it when such allowance would be proper; errors in overruling a motion for a continuance; errors in denying motions for new trial, in arrest of judgment, and errors in giving, refusing and modifying instructions, all which now constitute part of the record proper, will be held to be reversible error only, when the error assigned is found to have substantially prejudiced the party assigning error.

Error assigned on the admission or rejection of evidence, oral or written, will not be considered by the court of review, as hereinbefore stated, unless a bill of exceptions is brought up in the record, and such bill explicitly states that *all the evidence*, which was heard by the trial court in that cause, is contained therein. When such statement is not found in the bill, the

¹ Herfort v. Cramer, 7 Colo. 483-488; Marix v. Stevens, 10 Colo. 261; Rhodes v. Hutchins, 10 Colo. 258; U. P. Ry. Co. v. DeBusk, 12 Colo. 294; Calhoun v. Gerardine, 13 Colo. 103; McPhee v. Young, 13 Colo. 80; Walley v. P. & D. D. Co., 15 Colo. 579; Becket v. Cuenin, 15 Colo. 281; Buenz v. Cook, 15 Colo. 38.

court will presume that there was other evidence heard by the trial court sufficient to support the judgment, and as the person assigning error has the burden of showing the existence of error in the record, he must overcome the presumption that the court was justified, by the evidence heard at the trial, in rendering the judgment complained of, by the statement in the bill that it contains *all the evidence heard* at the trial.¹

So in assigning error as to the giving, modifying or refusing of instructions, the statement in the bill of exceptions that it contains all the evidence is indispensable, since, where an instruction is given, which is not applicable to any evidence found in the bill of exceptions, and it may have worked prejudice to the party who assigns error, the court of review will presume that there was evidence heard in the trial court, pertinent to the issue, which will justify such instruction, unless the bill states that it contains all the evidence heard. It is only when an instruction is beyond question erroneous, and prejudicial to the plaintiff in error, that the appellate court will reverse the judgment by reason of the giving or modifying of the instruction.

So an erroneous judgment is not cause for a reversal, when the trial is to the court, unless an

¹ Rvan v. Sanford, 133 Ill. 298; Goodwillie v. Lakeview, 137 Ill. 67; RR. Co. v. Lane, 130 Ill. 122; Hosmer v. Drain Dist., 135 Ill. 55.

exception is taken to the judgment and duly preserved.¹

Error in the admission of evidence, or the rejection of evidence, is reversible error only when the bill of exceptions contains *all* the evidence, and the evidence, properly admitted, does not support the action.

So error in matters in which the court is governed by discretion alone is not reversible error, unless the court has abused its discretion to the injury of the plaintiff in error, and the abuse of its discretion is patent on the record.

All errors which do not affect the jurisdiction of the court, or the sufficiency of the facts stated in the complaint as a cause of action, are capable of being waived by the action of the party who assigns error, had in the trial court. This waiver is held to take place when the party fails to take an objection to any objectionable matter on the trial, or to take and reserve an exception to any objectionable ruling of the court on motions, or the admission or rejection of evidence, or the giving of instructions, etc.

A further important rule is that it is not every error which will be sufficient to reverse a judgment. The error must be not only material and substantial,

¹ Patton v. C. & T. B. C. M. Co., 3 Colo. 265; Colo. Spgs. v. Hopkins, 5 Colo. 206; D. S. P. & P. RR. Co. v. Reed, 6 Colo. 330; Breen v. Richardson, 6 Colo. 606; Law v. Brinker, 6 Colo. 555; London C. & M. S. Co. v. Findlay, 6 Colo. 571; Wilson v. Gerhardt, 9 Colo. 594; Gibbs v. Wall, 10 Colo. 153; Bk. v. Leppel, 9 Colo. 594.

but it must also be materially prejudicial to the party who assigns it for error. If it do not affect the party assigning error, no matter how much it may affect others, he cannot maintain error thereon. Thus it is not tenable error for one defendant that the error assigned is prejudicial to a co-defendant. So error assigned that the trial court refused to allow a third party to intervene in the action is not reversible error as to any party but the one who seeks to intervene, for the action of the trial court, if prejudicial at all, is prejudicial to him alone, and not to the defendant.¹

INSTANCES OF REVERSIBLE ERROR.

SEC. 142. When incompetent evidence is permitted to go to the jury over objection properly interposed thereto in proper time, which evidence may have influenced them in rendering the verdict, the judgment will be reversed.²

Where the evidence set out in the bill of exceptions does not support the verdict of the jury, or does not show a cause of action against defendant, the judgment will be reversed.³

When an instruction is given, which is not based

¹ DeLappe v. Sullivan, 7 Colo. 182; McRobie v. Higgenbotham, 11 Colo. 313; Schoolfield v. Hoole, 13 Colo. 395; Cross v. Kistler, 14 Colo. 571; RR. Co. v. Gibson, 15 Colo. 299; Jackson v. Ackroyd, 15 Colo. 583.

² Ins. Co. v. Smith, 3 Colo. 422; Crane v. Andrews, 6 Colo. 353.

³ Mining Co. v. Findlay, 6 Colo. 571; Cross v. Kistler, 14 Colo. 572; RR. v. Gibson, 15 Colo. 299; Jackson v. Ackroyd, 15 Colo. 583; RR. v. Reed, 6 Colo. 330.

on evidence preserved in the bill of exceptions, the bill stating that it contains all the evidence heard, the court of review cannot assume that there was evidence admitted on the trial which warranted such instruction, and if the effect of the instruction was prejudicial to the party assigning it for error, the judgment will be reversed.

So where a cause is submitted to a jury on two distinct theories, one of which is clearly erroneous, and the court of review cannot determine on which theory the jury based its verdict, the judgment will be reversed. But a conflict between the instructions given will only be cause of reversal, when it clearly appears that such conflict might have injuriously affected the party complaining.¹

So where the court, over objection, allowed witnesses to testify as to their understanding of what was charged in the libel, it was held that as such evidence was calculated to mislead the jury, it was reversible error for the trial court to permit such evidence to be given.²

That the court instructed the jury orally is reversible error, only when the record shows that the trial court instructed the jury orally against the objection of the party assigning the giving of oral instructions as error.³

¹ *Mining Co. v. Findlay*, 6 Colo. 571; *King v. Post*, 12 Colo. 355; *Nuckolls v. Gaut*, 12 Colo. 361.

² *Republican Pub. Co. v. Miner*, 12 Colo. 77.

³ *Perkins v. Marrs*, 15 Colo. 266.

OBJECTIONS NOT CAUSE FOR REVERSAL, IF RAISED IN THE FIRST INSTANCE IN THE APPELLATE COURT.

SEC. 143. A variance between the complaint and the proof is not reversible error, if the objection be made for the first time in the court of review.¹

The giving of an erroneous instruction is not reversible error, if the instruction be given at the instance of the party who assigns it as error.²

The filing of a new and amended complaint, which introduces a new cause of action, is not reversible error, when such objection is first raised in the court of review.

That the action in an adverse claim suit was not brought in time is not reversible error, where the objection is made for the first time in the court of review.

That an unavailable defense was permitted to be made by the trial court is not reversible error, if the objection that the defense is unavailable to the party is first made in the appellate court.³

Irregularity in the form of the verdict must be corrected in the trial court and is no ground for reversal of the judgment.⁴

¹ Smith v. Roe, 7 Colo. 95; McCoy v. Wilson, 8 Colo. 337; King v. DeCoursey, 8 Colo. 463; Williams v. Mellor, 12 Colo. 1.

² Leitersdorfer v. King, 7 Colo. 437.

³ King v. Rea, 13 Colo. 69; Marshall S. M. Co. v. Kirtley, 12 Colo. 417; McCoy v. Wilson, 8 Colo. 337.

⁴ Ry. Co. v. Woodward, 4 Colo. 1; Quimby v. Boyd, 8 Colo. 200.

CHAPTER IX.

Procedure after Filing Transcript.

- SEC. 144. Procedure after filing transcript.
145. Rules of the courts of review.
146. Abstracts of the record.
147. Briefs of counsel -- what to contain.
148. Briefs -- when and how many to be filed
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156. Opinions on cases decided.
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158. Procedure in trial court on affirmance or dismissal by court of review.

PROCEDURE AFTER FILING TRANSCRIPT OF RECORD.

SEC. 144. Upon filing the transcript of the record with the clerk, the rules of both courts require the deposit of a docket fee of \$20 by the plaintiff in error or appellant, and \$5 by the defendant in error on entering his appearance. Rule 37 of the Supreme Court has been amended, so that it now is as follows :

“ Upon filing any suit or proceeding in this court, there shall be paid to the clerk by the party filing

the same the sum of twenty (\$20) dollars, which shall be for and in full payment of all clerical costs of such party in the cause, except for copies of papers. And upon the entry of appearance, the opposite party shall pay to the clerk the sum of five (\$5) dollars which shall be for and in full payment of the like costs of said party in the cause. Upon the final termination of the cause in this court, the successful party shall have judgment and execution against the unsuccessful party for the amount of such payment, together with other costs and damages awarded by the court pursuant to law or the rules of this court."

This rule abrogates the fee-bill adopted by the court prior thereto, as to cases brought thereto after May 24, 1889.

All procedure in the courts of review after the joinder in error is regulated principally by the rules of the courts, which are, for all practical purposes, identical in both the Supreme Court and the Court of Appeals.

RULES OF THE COURTS OF REVIEW.

SEC. 145. All courts of record have the inherent right to make rules regulating matters of practice and procedure, in matters not expressly provided for by law, provided they be not inconsistent or in conflict with express provisions of law.

This right is recognized by the Code. Section 407 enacts that the Supreme Court and all other courts

of record shall respectively have power to make rules and regulations for governing their practice and procedure in reference to all matters not expressly provided for by law. And section 394 enacts that "The Supreme Court may make all rules and regulations in regard to the manner of preparing abstracts so as to have the same uniform, and also all other matters of practice and procedure before it, when the same are not inconsistent with the provisions of this act." (The Code.)

Section 6 of the Court of Appeals Act provides that "the Court of Appeals shall have power to adopt rules regulating the procedure therein, in the same manner and with like effect as the Supreme Court, provided, that such procedure shall be so far similar to that of the Supreme Court as, in the judgment of the judges of said Court of Appeals may be practicable.

Rules of court, so made and duly promulgated, have the force and authority of laws, being made in pursuance of law, and by an authority which has lawful authority to make such rules. But it is held that such rules cannot remain unwritten, but must be made a matter of record and spread upon the records of the court before they become operative or of any force as rules.¹

It is said by the Supreme Court of Illinois, in *Lancaster v. Ry. Co.*, that the rules adopted by the court

¹ *Crump v. People*, 2 Colo. 319; *Trinidad v. Simpson*, 5 Colo. 65; *Cates v. Mack*, 6 Colo. 401; *Seymour v. Philips*, 7 Biss. (U. S.) 460.

“have the force of law and are obligatory on the court itself, as well as on the parties before it. While the court may at any time modify or rescind its rules, yet until it does so, it should administer them according to their terms, and it can have no discretion to apply them or not, according to its convenience, unless such discretion is reserved in the rules themselves. Thus — An order allowing an extension of time to file briefs, etc., is not a rescission of the rule requiring briefs to be filed within the time specified therein, but a mere modification of the rule in its application to a particular case. It merely postpones the power and duty of the court to enforce the rule to the expiration of the time of the extension granted. At the expiration of that time, if the rule be not complied with, it is the court's duty to enforce the rule violated.”¹

In pursuance of the statute above cited, the Court of Appeals have adopted all the rules of the Supreme Court which are applicable to the procedure in that court. In matters relating to appeals and writs of error, the procedure is substantially uniform in both courts.

OF ABSTRACTS OF THE RECORD.

SEC. 145. In pursuance of the provisions of section 394 of the Code, the Supreme Court and Court of Appeals both require, in causes taken to those

¹Owens v. Ranstead, 22 Ill. 161; RR. Co. v. Haskins, 115 Ill. 300; Lancaster v. Ry. Co., 132 Ill. 493.

courts either by appeal or writ of error, an abstract of the transcript of the record, which is filed on such appeal or writ of error. This is the next step in procedure after the pleas, if any, are disposed of, preliminary motions heard and decided, and joinder had in error.

Rule 16 requires this abstract to be printed on octavo pages in pamphlet form, and prescribes that it must set forth, First, the title of the cause; Second, the date of filing all papers in the trial court; Third, a brief statement of the contents of each pleading; Fourth, shall set forth fully the points of the pleadings or evidence, and the points relied on for the reversal of the judgment or decree. It shall, on the margin of the abstract, refer to the folio numbers in the transcript and bill of exceptions in such manner that orders, pleadings and evidence referred to in the abstract may be easily found in the record.

By rule 30, each party is authorized to withdraw the transcript from the custody of the clerk, without making an application to the court for leave to do so, and retain it in his custody for a period of eight days, for the purpose of preparing the abstract, required by Rule 16. But neither party can do so more than once without special leave of the court.

Eight printed copies of the abstract, prepared by the plaintiff in error or appellant, must be filed by him, in the clerk's office, within twenty days after the

return day of the *scire facias* in proceedings in error, under Rule 2, or in cases of an appeal, within twenty days after the day on which appellant is required to file the record, as prescribed by section 389 of the Code.

If the defendant's counsel is not satisfied with the abstract of the record filed by plaintiff's counsel, he may, within twenty days after the plaintiff's abstract has been filed, file with the clerk eight copies of such further abstract of the record, as he shall deem necessary to a full understanding of the merits of the cause, under Rule 17.

Rule 18 prescribes that :

"In case the appellant or plaintiff in error shall neglect or fail to file an abstract in compliance with the rules of the court, the adverse party may prepare the abstract, and have the cause heard *ex parte*, or the court may dismiss the appeal or writ of error."

Rule 19 prescribes that :

"If the abstract do not present the parts of the record to which reference is made in the assignment of errors, the appeal or writ of error may be dismissed."

It is customary for the party who assigns error to print a copy of the assignment of errors at the end of the printed abstract.

In preparing the abstract, care should be taken to set out fully in the abstract the portions of the record on which error is assigned. Thus, where the

error assigned is the insufficiency of the complaint to state a cause of action, the entire complaint should be set out in full in the abstract. If only one cause of action stated in the complaint, where there are more than one cause of action stated therein, is assigned as insufficient, that cause of action alone should be set out fully. So where an instruction is alleged to be inapplicable or erroneous, the instruction, and so much of the evidence incorporated in the bill of exceptions, upon which the instruction is based, as will show the error in the instruction, should be fully set out in the abstract. This rule should be carefully followed, as thereby the judges are saved much unnecessary labor in searching through the record, and the hearing of the cause is greatly facilitated.

The rule of court, which requires the plaintiff in error, or appellant, to prepare an "abstract" of the record, is intended to require a presentation in such abstract, at least in substance, of those parts of the record on which error is assigned by the assignment of errors. The court will not search the record for papers which may be therein, but are not mentioned in the abstract, nor for exceptions to the rulings of the court, or for any other matter assigned for error, unless the substance thereof is mentioned in the abstract. A mere index to the contents of the record is not considered by the court as an abstract, and it is the rule, when the abstract furnished is

merely an index to the contents of the record, to affirm the judgment of the trial court, under Rule 19 of Supreme Court.

Hence it is the duty of the plaintiff in error or appellant to abstract all pleadings or other matters on which he desires to raise any question in the court of review. If he fail to abstract it, the court will not examine into the merits of the error assigned thereon.¹

BRIEFS OF COUNSEL — WHAT TO CONTAIN.

SEC. 147. The brief of counsel for appellant or plaintiff in error shall contain a statement of the errors relied on and the authorities to be used in the argument of the case. The statement of the errors is usually a repetition of the language of the assignment of error, each error assigned being followed by a citation of the various decisions of the Supreme Court and Court of Appeals of the State of Colorado, and the decisions of other Supreme Courts of the various States and legal writers of authority, which counsel suppose will bear out their views, and support the assignment of error or the correctness of the ruling objected to, as the case may be. Rule 25 requires that: "In citing cases from published reports, the names of the parties, as they appear in the title of

¹ Truby v. Case, 41 Ill. App. 154; Creighton v. Garcia, 41 Ill. App. 430; Florez v. Brown, 37 Ill. App. 270; Parry v. Arnold, 33 Ill. App. 623; Magner v. Trumbull, 33 Ill. App. 646; Allison v. Allison, 34 Ill. App. 386.

the cases, as well as the book and the page thereof, shall be given." It will not be sufficient to cite an authority thus: "6 Colo. R. 157." The court will not tolerate a citation so made. If all the citations in the brief are made in such a manner, the court will probably strike the brief from the files as not in compliance with the rules.

When the decisions of the State courts are squarely in point, it is unnecessary to cite the decisions of courts of other States upon the same question, as it must be presumed that the State courts of review considered the opinions of the other courts, if made prior to their decision, in considering the case before them.

In preparing briefs, counsel should carefully examine the State reports for decisions upon the mooted points, the Supreme Court having, in more than one instance, complained that its own decisions are neglected in many cases, where decisions applicable to the points discussed might have been found, while the decisions of the courts of other States are copiously cited.

BRIEFS—WHEN AND HOW MANY TO BE FILED.

SEC. 148. Eight copies of appellant's or plaintiff's brief must be filed with the clerk of the court within *forty* days after the day fixed by rule for the filing of the abstract. The day fixed by rule for filing abstract is given hereinbefore, unless in special cases

further time be given by the court or by stipulation approved by the court.

The briefs must be printed like the abstract in octavo form. Two copies of each brief may be withdrawn by counsel for appellee or defendant in error, and the other six copies shall be for the use of the justices of the court.

Rule 21 prescribes that: "If the brief of appellant or plaintiff in error shall be filed in compliance with Rule 20, foregoing, the appellee or defendant in error (if the latter shall have joined in error pursuant to rule), shall file with the clerk eight copies of his brief within forty days after the expiration of the time mentioned in Rule 20 for the filing of the brief of the appellant or plaintiff in error. If the appellee or defendant have not joined in error, no other brief is filed except that of appellant or plaintiff in error.

If the defendant or appellee file a brief, the appellant or plaintiff in error has twenty days in which to file a reply brief, eight copies to be deposited with the clerk as in the other cases.

The Following Schedule will be of Service.

Abstracts must be filed within twenty (20) days after the return day of the *scire facias* on error, or in cases of appeal within twenty (20) days after the day on which appellant is required to file his transcript.

Brief of appellant or plaintiff in error forty (40) days after the day appointed by the rule for filing abstract.

Brief of appellee or defendant in error forty (40) days after the expiration of the time prescribed by rule for filing of plaintiff's brief.

Reply brief to defendant's brief twenty (20) days after expiration of the time prescribed by rule for filing defendant's brief. With the latter brief the filing of briefs ends, unless further briefs are requested by the court, or leave of the court obtained for the filing thereof.

Rule 22 provides that "by consent of parties or for good cause shown, the court, or a justice thereof in vacation, may extend the time for the filing of abstracts and briefs." It seems that where a stipulation is entered into by the parties for an extension of time, such stipulation will have no effect, unless an order extending the time for filing abstracts, etc., is made and entered of record by the court, or by one of the justices, if made in vacation. The consent of parties to an extension of time is most frequently given in open court, when the attorneys are both present. If the consent be given out of court it ought to be reduced to writing, be signed by both parties, and filed in court. Then at an open sitting of the court the attention of the court should be called thereto, and the consent of the parties ratified by an order of the court.

By Rule 24 the time for filing abstracts and briefs is not extended or postponed by the filing of any motion in the cause, after the joinder in error. A postponement, required by reason of the filing of a motion in the cause, until the motion is heard and disposed of, must be made on the order of the court, or of one of the justices.

It is further provided by Rule 26, that counsel who have not complied with the rules as to the filing of briefs will not be heard.

RULE AS TO COMPUTATION OF TIME.

SEC. 149. In the computation of the time for filing abstract and briefs the rule is that prescribed by section 382 of the Code, *i. e.*, the exclusion of the first day and the inclusion of the last. The question of the construction of this rule is directly passed upon in the case of *Evans v. Bowers*, 13 Colo. 511, and the exclusion of the first day mentioned and the inclusion of the last day in the computation of the number of days given, held to be the correct rule.

In Illinois, however, the question was raised, in case of a failure to file a transcript in the Supreme Court within the number of days prescribed by the law of that State, whether the Sunday, the last day of the number of days prescribed, was to be counted as a day of the term, or to be excluded from the computation of the time, so that the transcript might be filed on the next succeeding day.

The court says :

“ A term of court is the period of time fixed by law for the hearing of causes, and the transaction of judicial business therein. The term as fixed by statute is to commence on a particular day, and after its commencement it continues, whether the court sits during the days composing it or not. A day may, therefore, be one of the days of the term, notwithstanding the court may not sit on that particular day; and it can make no difference whether the failure of the court to sit on that day results from an adjournment by the court from one day to another day in the same term, or because the intervening day is *die non*. In the computation of time all adjournments are to be included. *Leib v. Com.*, 9 Watts, 200.

“ For most purposes a term of court is considered as one day; but for the purposes of this section of the Practice Act the term is made to consist of ‘days’ and the word ‘day’ is used in its popular sense. The fact that Sunday is not a judicial day does not, within the contemplation of this statute, render it any less a day of the term.” *Brown v. Leet*, 136 Ill. 205.

The court, therefore, dismissed the appeal for the failure to file the transcript within the time prescribed by the statute. The objection there made would, however, not be good in Colorado, since the Code provides that, when the last day falls upon a Sunday or legal holiday, they shall be excluded, and the act may be done on the next judicial day. Code, § 382.

LEAVE TO FILE BRIEFS AFTER TIME.

SEC. 150. Where a party has failed to file his briefs within the time prescribed by the rules for so doing, but prepares them and tenders them to the clerk for filing, if he desire leave to file them he must give notice to the adverse party of his intention to apply to the court for leave to file them and on such notice *make a motion* at an open sitting of the court for such leave.¹

The court will usually grant such leave, if satisfied that it is in the interest of justice so to do. But where briefs are tendered for filing and no application is made to the court for leave to file them, the case will be dismissed for want of prosecution, if the default be that of the plaintiff in error or appellant, or be heard *ex parte*, if the default be that of the defendant or appellee.

Upon the expiration of the time prescribed by the rules for the filing of the briefs by the respective parties the cause is at issue for decision, in the order in which it may be taken by the court. and it is then placed on the submission docket.

DISMISSAL FOR NON-COMPLIANCE WITH RULE.

SEC. 151. The appeal or writ of error is liable to be dismissed by the court, without notice to the

¹ RR. v. Woy, 7 Colo. 556; Owen v. Going, 13 Colo. 290; RR. Co. v. Wilford, 13 Colo. 551.

parties, for want of prosecution, if, when placed on the submission docket, no briefs have been filed by the plaintiff in error or appellant, under Rule 23.

ORAL ARGUMENT.

SEC. 152. Under the act of 1889 oral arguments by counsel for either party must be heard by the appellate court, if such party request it. The statute is but a repetition of the standing rule of the Supreme Court, which has been in force for a great many years, and which has always permitted the oral argument of a cause, in addition to the printed briefs and arguments filed, when proper application is made therefor. No instance of a refusal to hear oral argument is known, it is said, in *Devotie v. McGeer*, 14 Colo. 592. The rule has always been regarded as obligatory by the court.

The rule (27) is as follows

“Any cause upon the submission docket may be moved by either party for oral argument. Such motion shall be delivered to the clerk and filed with the papers in the cause. Prior to reaching such cause for decision, the court will fix a day for the argument, due notice of which will be given to the parties by the clerk.”

The motion must be in writing and due notice of the same be given to the adverse party as in other cases of motions. It is the usual practice for the party who moves for an oral argument, to call up the

motion therefor at an open session of the court, and have the time then fixed for the oral argument. By so doing the convenience, both of the court and of the parties, can be best consulted. By Rule 40 of the Court of Appeals "application for an oral argument is to be made on the second Monday of each month, in person or by attorney, when the case will be set down for oral argument, as the business of the court will permit. Stipulations for oral argument may be entered into between the parties, save as to the time when the oral argument will be heard by the court, which time will be fixed by the court, of which attorneys must take notice." If application for oral argument be not made on the second Monday of each month, the right thereto will be considered as waived.

At the oral argument the judges frequently suggest matters to the counsel for their discussion, which are not discussed in the printed briefs, and ask their views upon points pertinent to the issues before the court, by which the court may arrive at a more satisfactory determination of the points involved in the issues. Counsel, therefore, on preparing to argue a case orally, should prepare themselves to answer points which may be suggested by the judges as bearing on the matters involved, since a satisfactory answer to such suggestions may prove of vital import in the decision of the cause under discussion.

The party holding the affirmative begins and concludes the oral discussion. The court will usually limit the time to be occupied by each counsel.

ADVANCEMENT OF CAUSES FOR DECISION.

SEC. 153. In many cases, which are of great importance, or *publici juris*, it is the practice of the courts to advance the same on the submission docket for an earlier hearing and decision than it would receive, if taken in the order in which it stands on the submission docket. But to secure such an advancement of the cause, the court requires a showing of an importance to the public interests, as distinguished from the interests of the parties litigant, that a speedy decision of the material question or questions involved be arrived at and announced. Private interests, no matter how urgent, except in criminal causes involving the death penalty, meet with little favor when an application is made to advance the cause. There is, however, a class of causes, which, by Rule 51 of the Supreme Court, adopted by the Supreme Court in September, 1890, may be advanced without any showing. The rule is :

“In case an executor, administrator or conservator of the peace is a party to an action in this court in that capacity, after it is put at issue and submitted in accordance with the rules of this court, the person or party so prosecuting or defending in such representative capacity may have the cause advanced to

the head of the submission docket, upon motion, without further showing in support thereof."

To procure an advancement of such cause, it is requisite that the record show that the cause is one of those mentioned in the rule, and the party desiring such advancement must ask it by a motion, according to the rules of the court. The above rule is also Rule 39 of the Court of Appeals.

AGREED CASES.

SEC. 154. An agreed case is a cause wherein the parties to the cause mutually agree upon the facts of the case, and reduce the same to writing, and ask the court to decide the questions of law only, which properly arise upon that statement of the facts. To secure consideration of an agreed case, the questions submitted must not be merely speculative, or submitted merely to obtain judicial opinions on points of law, which the parties desire to know for their own interests or purposes. There must exist a real and subsisting controversy between those who appear in the cause as adverse parties to the suit, and it must not affect the rights or interests of third parties who are not parties to the submission. When an agreed case is submitted with a view of affecting the rights of third parties not parties thereto, it becomes collusive. Hence, the Supreme Court has adopted the following rule in relation to agreed cases :

“No judgment will be pronounced on any agreed case unless an affidavit of some credible person shall be filed, setting forth that the matters presented by the record are litigated in good faith by the parties, about a matter in actual controversy, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matters in controversy between the parties to the record.”

The affidavit required should be made by one of the parties to the agreed case, if it can conveniently be done, or at least by an attorney of the court conversant with all the facts, and should be filed at the time of filing the agreed case. The affidavit should be such as to remove all suspicion of collusion or sinister motive in submitting the case for decision. Though nothing is said in the rule as to the filing of briefs in such cases, the case will be governed by the rule as to briefs in other cases, as the agreed case is intended to merely remove from the field all controversy over the facts, and seek a determination of the law as applicable to those facts. The statement of the facts will be presumed by the court to contain all facts necessary to a proper determination of the questions of law involved, and on that statement the court will not only determine the law of the case, but will also render the appropriate judgment, and enforce the same.¹

¹ Rule 31 of Supreme Court; *People v. Boughton*, 5 Colo. 487.

It is the practice of the Supreme Court not to entertain any agreed case, unless the questions involved be questions in which the *public*, as distinguished from the parties litigant, is primarily interested, if the matter can properly be submitted in the first instance to a trial court, and thence be brought up by appeal or writ of error. It will also, seldom, if ever, entertain an agreed case in matters not within its original jurisdiction.

The rule above mentioned has also been adopted by the Court of Appeals, but as this court has by the statute no original jurisdiction, it seems that it has no power by law to take cognizance of an agreed case, except by way of an appeal from, or a writ of error to, a trial court on a final judgment rendered therein.

THE JUDGMENT ON APPEAL OR WRIT OF ERROR.

SEC. 155. The Code provides that :

“In all cases of appeals or writs of error, the Supreme Court may give final judgment and issue execution, or remand the cause to the lower court in order that execution may be there issued, or that other proceedings may be had thereon.” And also

“The Supreme Court, in case of a partial reversal, shall give such judgment or decree as the inferior court ought to have given, or remand the cause to the inferior court for further proceedings, as the case may require.”¹

¹Code, §§ 390-398.

The ordinary course of practice in the courts of review is either to affirm the judgment of the trial court, or to modify the judgment, or to reverse the decision of that court. Though the statute gives it power, in case of modification or reversal of the judgment, to enter the proper judgment in the court of review, the almost uniform practice is to remand the cause to the trial court for the entry of the proper judgment in case of modification, and for further proceedings in case of reversal. This is also more advantageous to litigants, especially those residing in distant counties, as they can more easily procure process to enforce the judgment at their own county seat, without being obliged to resort to the capital of the State to obtain the proper process. The instances are infrequent, though occasional, wherein the court of review orders the final judgment to be entered on its records, as permitted by the statute.

OPINIONS ON CASES DECIDED.

SEC. 156. In each cause decided by the court of review, the law requires, and the practice of the courts is, to write an opinion, stating the points determined by the court in that particular case. The opinion is usually written by one of the judges, assigned by the court for that purpose, but it is the opinion of all the judges, concurred in by all, unless otherwise stated in the opinion, or unless one of the judges writes a dis-

senting opinion. The opinion constitutes the law of that case. There are also opinions frequently filed which are termed "*Per Curiam*" opinions, that generally determine some matter of procedure or some matter of minor importance. The opinions are announced at the opening of the public sittings of the court, when two or more of the judges are present, and are then filed by the clerk with the other papers in the case, and when a sufficient number of such opinions are rendered, they are then published by the official reporter in a volume, constituting the official reports of such decisions.

With the procedure of the judges, after the case has been argued and submitted, and prior to the announcement of the decision by the court, the attorneys of the parties have no concern, and can take no action. The judges apportion the cases submitted among themselves, as they deem most suitable to their convenience, the only rule in regard to the opinions being that a judge shall not participate in the decision of the case, where he was counsel or sat as the trial judge in the case, unless his concurrence be necessary to render a decision.

REHEARING OF CAUSES.

SEC. 157. The next step after the announcement of the decision by the court, if deemed necessary by the unsuccessful party, is to apply for a rehearing, if the party deems that important questions, vital to a

proper decision of the cause, have been overlooked by the court in its opinion.

An application for a rehearing is somewhat similar to an application for a new trial in a trial court. There being no statute which regulates the time and manner of applying for a rehearing, the courts of review have adopted the following rule in relation thereto:

“ Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court erred, such petition to be filed within fifteen days next after the filing of the opinion in the cause. Counsel may accompany such petition with a brief of the authorities relied upon in support thereof.

“ The filing of a petition for a rehearing shall suspend proceedings under the decision, until the petition is disposed of, unless the court in term time or one of the justices in vacation shall otherwise order.

“ It must be borne in mind that though the court does not, in the written opinion, express its views upon every point which is discussed in the briefs and arguments of counsel, such failure to express its opinion on the omitted points is no evidence that the point omitted has not been considered and passed upon by the court in its consideration of the case. It is the practice of the court to express its views in its opinions on *only* such matters as it considers necessary to a just decision of the essential questions

involved in the cause. Hence rehearings are allowed as a rule, only when some new matter or point, that is essential or pertinent to a proper decision of the case, has not been considered by the court in the hearing or determination of the case, but which, if considered, would have changed or modified the opinion and decision rendered.

The new matter or point pertinent to the point or decision is something which has a bearing on the questions presented at the formal presentation of the case to the court, not an error, which is disclosed by the record, but which counsel have seen fit to ignore in presenting their case. Hence additional averments or evidence are not permissible on rehearing, and nothing will be then considered except that which is contained in the original transcript, as submitted.

So if parties do not take the trouble to call the attention of the court to errors which exist in the record that the court did not examine and pass upon, *proprio motu*, such errors are no ground for a rehearing.

In the case of Knoth v. Barclay, on petition for a rehearing, the court says: "It is the duty of counsel to present all the questions on which they rely, in their briefs and arguments in the first instance, and the court in reviewing the cause does not usually go beyond the subjects to which its attention is thus invited. Counsel are not permitted to present part of their case at the formal submission and the re-

mainder at the rehearing. If they have discussed all the errors and defects upon which they rely, but after the submission some new matter or point bearing on *those* errors or defects be discovered, or if it is believed that the court has overlooked something which is material to a correct conclusion thereon, a rehearing is in order."¹

It is held by the Illinois courts that the time for taking an appeal from the final judgment of the appellate court to the Supreme Court is not extended by the pendency of a petition for a rehearing in the appellate court. The appeal to the Supreme Court, if an appeal lies thereto, must be asked and allowed within the time prescribed by the statute, notwithstanding the pendency of the petition for rehearing, though such petition be as yet undetermined by the court. This question has not been raised as yet in Colorado, but the ruling will probably be followed, in analogy to the ruling that an appeal to the Supreme Court must be prayed in a trial court of record, within the time fixed by the statute, though a motion for a new trial be then pending therein.²

Upon the determination of a petition for a rehearing, or if no such petition have been filed within *fifteen* days after the final judgment, the clerk issues to the trial court in proceedings by appeal or writ of

¹ Knoth v. Barclay, 8 Colo. 395; Parks v. Wilcox, 6 Colo. 600; Supreme Court Rules 32, 33 and 34.

² Goldsborough v. Gable, 39 Ill. App. 279; Oberne v. Bunn, 39 Ill. App. 127.

error, or in original proceedings in the Supreme Court, a certified copy of the final judgment, and on payment by the party who asks for such copy of any balance of costs due the clerk, the clerk issues a fee-bill or execution out of the court of review.

PROCEDURE IN TRIAL COURT ON AFFIRMANCE OR DISMISSAL IN THE COURT OF REVIEW.

SEC. 158. "When an appeal or writ of error shall be prosecuted from the judgment of any court of record of this State to the Supreme Court, and said appeal or writ of error shall be dismissed, or the judgment of the lower court affirmed, it shall be the duty of the clerk of the court from which said appeal or writ of error was prosecuted, upon a copy of the order of the Supreme Court dismissing said appeal or writ of error, or affirming said judgment, being filed in his office, to issue execution upon said judgment, and to proceed thereon in all respects as though no appeal or writ of error had been prosecuted from said judgment."

The above section is a substantial copy of the Illinois statute of 1845, which has been construed by the Supreme Court of that State, in *Smith v. Stevens*, 133 Ill. 189. The objection was there made that no writ of *procedendo* was ever issued from the Supreme Court to the trial court in the case, and, therefore, that the trial court was never reinvested with juris-

diction over the judgment. The court answering the objection says:

"The mode by which the Circuit (trial) Court may be reinvested with jurisdiction of a judgment, which has been removed to this court by appeal, after the affirmance of such judgment by this court, is prescribed by the eighty-third section of the Practice Act," which is substantially the same as the above Code provision.

A copy of the order of affirmance, or dismissal, having the effect of an affirmance, is to be filed in the office of the clerk of the court below to reinvest that court with jurisdiction to proceed with the execution of its judgment. * * * According to the usual practice of this court, no subsequent order is made. The judgment of affirmance is the final order, and terminates the litigation so far as this court is concerned. A certified copy of that order, when filed in the court below, operates as a *procedendo*, and authorizes that court to proceed with the judgment in all respects as though no appeal had been taken."¹

In criminal cases a remittitur would probably be indispensable, since the above provision is found only in the Civil Code, and is, therefore, inapplicable to criminal causes.

¹ Code of 1887, § 399; *Smith v. Stevens*, 133 Ill. 189.

CHAPTER X.

Writ of Error in Criminal Cases.

- SEC. 159. Criminal trials according to the course of the common law.
160. Writ of error a writ of right.
161. Exceptions and bill of exceptions.
162. Who may take exceptions in criminal cases.
163. The record proper in criminal cases.
164. *Supersedeas*, how obtained
165. Effect of *supersedeas*, bail.
166. Reversible error in criminal cases.
167. Procedure after judgment of Supreme Court.

TRIALS IN CRIMINAL CASES REQUIRED TO BE CONDUCTED AS AT THE COMMON LAW.

SEC. 159. The common law of England, as adopted in the State of Colorado, is the mere creature of the statute adopting it, and does not exist by virtue of its being subject to the common law as being part of British territory, prior to its acquisition by the United States. It must be remembered that the territory which is included in the State of Colorado was originally subject to the civil law, as was all the country west of the Mississippi river, and that there being no common law under the United States Federal government, the civil law would have continued to govern, until by State or Territorial legisla-

tion the common law was substituted for it. Hence when the common law was adopted by Territorial authority, it was adopted under such restrictions and limitations as the legislature saw fit to make. It was the enactment of a law establishing a new rule, and not of a restriction on an established rule, which left in full force the rule only as it was limited by the legislation.

By express statute, all trials for criminal offenses against the laws and under the Criminal Code of Colorado, in courts of record of the State, must be conducted as they were conducted in the law courts of England prior to the fourth year of James the First, and the rules of evidence in such courts, as they then existed, are binding on all courts of record, which have jurisdiction of criminal cases, unless changed by statute of the State.¹

The provisions of the Civil Code not having any application whatever to criminal procedure, all modifications or alterations of the procedure in criminal cases must be looked for in general laws, which do not profess to amend the Civil Code. Thus the Civil Code provisions regulating procedure in the courts are applicable to criminal procedure only in those particulars wherein the Civil Code provisions and the Rules at common law are identical. If the Civil Code makes any change in the common-law rules, that change does not apply to the procedure in crimi-

¹ Mills' Stat., § 1467.

nal cases. Thus the Code provisions, which make instructions and certain classes of motions a part of the record proper, which were necessarily to be brought up by a bill of exceptions, under the common-law procedure, will not be applicable in a criminal case. The record proper is in such cases, under the Colorado procedure, the same as it is at common law.

IN CRIMINAL CASES, NOT CAPITAL, A WRIT OF
ERROR IS A WRIT OF RIGHT.

SEC. 160. At the common law, as it existed prior to fourth year of James the First in England, a writ of error in a case of felony, which was then in most cases a capital offense, was obtainable only as a matter of favor, on application to the attorney-general, and then only on a showing of the existence of material error in the record proper. Without the *fiat* of the attorney-general a writ of error to a final judgment, in a prosecution for a felony, could not be obtained. When allowed, nothing could be reviewed under it but the record proper, as a bill of exceptions was not allowed in cases of felonies to be made a part of the record, and for that reason such matters as could only be incorporated into the record by a bill of exceptions, under the practice in civil cases, could not be brought before the court of review for revision.¹

¹ 1 Bacon Abr. 453, 528.

But by express statute this provision of the common law has been abrogated, and in all cases not capital a writ of error to the final judgment of the court in a criminal case, whether it be a felony or a misdemeanor, is a writ of right, and issuable, of course, without the necessity of applying to the court for its allowance.¹

But in cases where a sentence of death is pronounced by the trial court, a writ of error is not a writ of right, but can be issued only on an application to the Supreme Court, which alone, under the act of 1891, has jurisdiction to review cases of this character; or if the court be not sitting, to one of the justices of the Supreme Court. The statute makes no provision for its allowance by any other, in the absence or inability of the justices of that court to act in the particular case.²

The distinction, in the obtaining of the writ of error, between the procedure in capital cases and in other criminal cases ought to be carefully observed, though in practice the difference is hardly noticeable, since a writ of error does not stay proceedings in the execution of the sentence, unless a *supersedeas* order is had, which latter must be applied for to one of the justices, in vacation, or to the court if it be in session. Except in capital cases, the Court of Appeals has concurrent jurisdiction with the Supreme Court in

¹ Mills' Ann. Stats., § 1479.

² Mills' Ann. Stats., § 1478.

all criminal causes, and a writ of error may be issued out of it, and it may grant a *supersedeas* in the same manner that the Supreme Court can.

In proceeding under the Colorado procedure, practitioners will note that but few of the States follow the common law as nearly as does Colorado and Illinois. Almost every other State has its own peculiar Code of Criminal Procedure, by which criminal prosecutions in such States are governed. Hence, many of the decisions of those States, as to the mode of procedure, are inapplicable wherever such decisions depart in any manner from the procedure at the common law, unless the statutory enactment and that of Colorado are identical.

But as most of the Criminal Code of Colorado has been, in substance, taken from the statutes of Illinois, the decisions of the Supreme Court of Illinois will in most cases have a controlling effect, and are usually adopted by the Colorado courts of review.

The court of review can acquire jurisdiction in a criminal case only through a writ of error duly issued. Jurisdiction cannot be taken by an agreement of parties.¹

EXCEPTIONS AND BILLS OF EXCEPTIONS.

SEC. 161. In most criminal cases, a writ of error, if limited to the review of the record proper, as was the common-law rule, would be of but little if any

¹ *People v. Myers*, 1 Colo. 509; *Mohler v. People*, 24 Ill. 26.

benefit to the accused. Experience teaches that errors, if any, usually occur in the admission or rejection of evidence and other matters, which can be brought to the attention of the court of review only by a bill of exceptions, and if the common-law rule were followed, such errors, be they ever so injurious to the accused, could not be remedied. Hence the statute provides :

“ That exceptions taken to opinions and decisions of any court in this State, refusing motions in arrest of judgment, for new trials or for continuances or change of venue shall be allowed in criminal cases.

* * * And the party excepting to such decisions may assign the same for error in the same manner as in civil cases.”¹

The statute further provides that :

“ In the trial of any person or persons for any crime or misdemeanor, it shall be the duty of the judge before whom such trial is pending, to sign and seal any bill of exceptions tendered to the court during the progress thereof, provided, that the truth of the case be fairly stated in such bill of exceptions ; and thereupon said exceptions shall, by the clerk of said court, be entered in the record of said trial and become for all intents and purposes a part thereof.”²

It will be noted that the foregoing statute does not provide that a bill of exceptions may be prepared

¹ Mills' Stats., § 1497.

Mills' Stats., § 1477.

after the expiration of the term, as is expressly permitted in civil cases by section 385 of the Civil Code, and be tendered to the judge for his seal and signature "at any time thereafter to be fixed by the court." Hence, to comply with the law strictly, a bill of exceptions, in criminal cases, must be tendered "during the progress of the trial." But as the term of the court is ordinarily treated as one day, no matter how many days, weeks or months it may continue in session, and as the trial is regarded as in progress from its inception to the sentence of the accused, on a verdict of the jury finding the accused guilty, a liberal construction of these words gives the whole term for the preparation of the bill of exceptions. In counties wherein the session of the court is limited to a few days, if it be necessary to do so, to enable counsel to prepare the bill, the court will usually postpone the sentence until the last hour of the sitting for the term, and thus enable him to tender his bill in the time prescribed by the statute.

The statute nowhere empowers the judge to sign and seal a bill of exceptions, in a criminal case, at any time, except "during the progress of the trial." Hence it seems that an order of the court, made in term time, allowing the bill to be tendered and filed after the expiration of the term, is a nullity, in a criminal case, though legitimate in a civil case. And if the bill of exceptions, as brought to the notice of the court of review, shows that it was signed and sealed

by the court, after the time fixed by law, on motion it will be stricken from the record. But if it be made to appear that the bill was duly prepared and tendered to the judge within the term, and that the failure to sign it and seal it, and file it with the clerk was occasioned wholly by neglect on the part of the judge, the party, especially in a criminal case, will not be prejudiced by such neglect or failure of the judge to sign it in time.¹

It is further to be borne in mind that no provision is made by the statute for a remedy, where the judge neglects or refuses to sign a bill of exceptions, duly tendered to him in time. The party in such case must apply to the court of review for a *mandamus* to compel him to sign and seal such bill. The *mandamus* in such case is not an ordinary writ, but is issued in aid of the jurisdiction of the court of review, and for that reason the Court of Appeals may issue it in a case of which it has acquired jurisdiction by a writ of error, duly issued out of such court.² The provision authorizing the authentication of a bill of exceptions by affidavits is applicable only to civil cases.

The rules governing bills of exceptions, as hereinbefore explained in civil cases, apply also to bills of exceptions in criminal cases. The law governing them as to the matters that must be included therein

¹ Hawes v. People, 129 Ill. 127.

² People v. Anthony, 129 Ill. 223; Hawes v. People, 129 Ill. 128; Smith v. People, 1 Colo. 131.

is that which was in existence at the time of the adoption of the Code of Civil Procedure.

The bill must show on its face that the exception was duly taken and reserved, at the time of the ruling or decision excepted to, and not at a time subsequent thereto. If an objection is made to the introduction or exclusion of any evidence offered at the trial, or to any other matter, a ruling and decision thereon must be asked of the court, and it must show an exception then taken and preserved. If the court refuse to rule thereon, an exception should be taken to his refusal to rule and determine the matter.

When preparing the bill of exceptions, the counsel will bear in mind that there is a material difference between civil and criminal trials. While the rule applicable to both classes of cases is uniform, that the plaintiff in error is required to show error in the record *affirmatively*, yet if the matter assigned for error involves discretion, presumption or construction, affecting a substantial right of the accused, the court must solve such matters, in case of doubt, in favor of the accused. The court will give the accused the benefit of the doubt. Thus in criminal matters the court will not be governed by the presumption, as against the accused, that all that is done is rightly done, but will * * * rigidly apply the rule in favor of the accused, that intention and mental capacity to commit the crime are essential ingredients of a crime.

The bill must be signed and sealed by the judge as in civil cases. It cannot be made a bill of exceptions by a stipulation of counsel, whether made in the trial court or in the court of review.

As the failure to seal a properly prepared bill of exceptions arises in a great many cases from mere inadvertence, we would suggest that counsel, especially when the errors assigned are chiefly to be found in the bill, specially examine the bill as filed in the trial court, as well as the copy attached to the transcript, and if the error be in the sealing of the original bill, take proper measures to have the judge seal it. If the error be in the copy, the clerk should be applied to correct his omission.

WHO MAY TAKE EXCEPTIONS IN CRIMINAL CASES.

SEC. 162. As the matters to which exceptions may be taken in a criminal case, under section 1497 of Mills' Statutes, seem to be such matters as may injuriously affect a defendant only, it would appear that a defendant alone can take exceptions to the adverse rulings of the court in the case. But section 1477 seems to be broad enough in its language to permit exceptions to be taken by the prosecution, the words "any bill of exceptions tendered to the court during the progress," etc., being an apparently sufficient authority to authorize the prosecution to take exceptions, and present a bill for the signature and seal of the judge. No harm can arise to the defense by al-

lowing the prosecution to take exceptions, since the people not being authorized to prosecute a writ of error in a criminal case, the bill will be unavailable, unless the defendant prosecutes a writ of error to a judgment of conviction, in which case the alleged errors of the trial court, as against the prosecution, might be reviewed on an assignment of cross-errors, and many questions now held in doubt, both as to the law and procedure, may be solved with great benefit to the administration of the criminal law of the State.

While no statute authorizes the assignment of cross-errors in criminal cases, the rule of the Supreme Court as to cross-errors might be construed to authorize such assignment by the prosecution, when defendant takes his writ of error.

The foregoing statute as to bill of exceptions in criminal cases is substantially the same as that of Illinois, from which it seems to have been taken, and, therefore, many of the decisions of that State thereon will be found applicable

THE RECORD PROPER IN CRIMINAL CASES.

SEC. 163. In a criminal case the record proper is usually very brief. It will consist of the *placita* or convening order, as hereinbefore explained, the presence of the district attorney being noted in the *placita*; the impaneling of the grand jury where the prosecution is by an indictment; the return of the grand jury and the presentation by it of an

indictment against the defendant, duly indorsed "a true bill" and a copy of the bill so returned and filed. If the prosecution be by information, the filing of such information and a copy thereof, must be stated. The record should then show the judge's indorsement of the amount of bail, the order for *capias* to issue, the arraignment and plea of the defendant; that he was furnished a copy of the indictment and a list of the jurors and people's witnesses; that he was assigned counsel, if he was unable to employ counsel by reason of poverty, and if for the same reason he was unable to procure the attendance of the necessary witnesses on his behalf, that the court made the necessary order for their attendance at the costs of the people; that defendant was present at every stage of the proceeding, accompanied by his counsel, especially at the rendering of the verdict, at the hearing of the motions for a new trial and in arrest of judgment, if any are made; the verdict of the jury, the judgment and sentence pronounced by the court. All the orders made and entered of record in the course of the proceeding should also be transcribed into the record.

The record must be made up as it was at common law practice, nothing being inserted therein, but what is properly part of the record at the common law. The same provisions that apply to prosecutions by indictment apply in like manner to prosecutions by information, under the act of 1891.

All that has been hereinbefore said as to the record in civil cases will apply equally to criminal cases, excepting the modifications made by the Civil Code as to parts of the record in the rules as they exist at common law.

In criminal prosecutions by information, recently adopted in the Colorado procedure from Wisconsin substantially, the objections to the right of the district attorney to file the information for a non-compliance with the eighth section of the Information Act, must be raised in the trial court by a plea in abatement and not by a motion to quash. This plea and the replication by the district attorney, or his demurrer, if he file one, will appear in the record, and need not be copied into a bill of exceptions. But motions to quash the information for any thing that appears on its face are properly to be incorporated into the bill of exceptions.

All pleadings are part of the record proper, but the rule at common law is, that all motions and exceptions to rulings during the progress of the trial must be preserved and brought to the attention of the court of review by a properly authenticated bill of exceptions, if it is desired that the motions and exceptions be reviewed. A recital in the record by the clerk, that an exception was taken or allowed, is not sufficient.¹

¹ Rutter v. Shumway, 16 Colo. 95; Bank v. Elwood, 16 Colo. 244.

In *Parker v. People* the Supreme Court of Colorado say: If plaintiffs in error desire a review of the proceedings had in impaneling the grand jury, they should have brought the whole record up. It is not necessary to have the record of the formation of the grand jury repeated in each particular case taken to the court of review. If any irregularity is claimed to exist in its formation such irregularity must be presented to the trial court by plea before the commencement of the trial, the ruling of the court had thereon, and such ruling assigned for error in both the assignments of error and briefs. It is only when irregularity is claimed in the formation of the grand jury, and an assignment of error is based thereon that it becomes necessary to incorporate the proceedings in the selection and impaneling of the grand jury into the record.¹

So it is not indispensable that the records show that defendant was served with a copy of the indictment or information and a list of jurors previous to his arraignment. The statute does not require this to be made a part of the record, but the better practice is to make this fact appear affirmatively by the record. If, however, this is not in fact done, the defendant should make a demand for such copy and list of jurors, and if such demand be then refused he should take an exception to such refusal and incorporate

¹ *Parker v. People*, 13 Colo. 155.

such demand and refusal and his exception thereto in his bill of exceptions.¹

So the recital by the clerk in the record, that a motion for a new trial was made, heard by the court, overruled, and exception taken thereto, is no part of the record, and should not be incorporated therein. If a new trial is asked, which should be done in criminal cases, if it is intended to take the cause to a court of review, since the Code provision dispensing with motions for new trial, under certain circumstances, is inapplicable to criminal cases, the motion, ruling of the court, and exception thereto must be incorporated in a bill of exceptions.

So, if the defendant makes the proper affidavit to procure the attendance of his witnesses at the public expense, and his application therefor is refused, he should incorporate his affidavit and motion in the bill of exceptions, if he desire to assign error thereon. The record order denying the application will not bring such application and ruling to the attention of the court of review.

SUPERSEDEAS, HOW OBTAINED.

SEC. 164. In most cases, the principal object in prosecuting a writ of error in a criminal case is to obtain a *supersedeas*, or stay of execution of the judgment and sentence of the court, until the decision of the Supreme Court is had. A writ of error in cases not capi-

¹ Kelley v. People, 132 Ill. 371.

tal does not operate to stay execution of the sentence pronounced by the trial court. A special application for a *supersedeas* must be made therefor. The statute in regard to obtaining a *supersedeas* in *non-capital* cases is as follows:

“ No writ of error shall be a *supersedeas* unless the Supreme Court, or one of the justices thereof in vacation, after inspecting a copy of the record, certified as in the preceding section (Mills' Stat., § 1478), together with an assignment of errors relied on for a reversal of the judgment, shall be of opinion that there is reasonable cause for allowing a writ of error. In such case the *supersedeas* is granted by order indorsed on the back of such record, in which case the clerk of the Supreme Court shall issue a *supersedeas*, which shall have the effect to stay the execution of the sentence, but not discharge the prisoner from custody.”

In capital cases a writ of error, under the statute, does not issue of course, as in ordinary felonies and misdemeanors, but is obtainable only on an application to the Supreme Court, or in vacation to one of the justices of the Supreme Court. The statute requires that the party complaining of error in the record in any capital prosecution shall, First, obtain from the clerk of the trial court a certified copy of the record ; Second, from the trial judge, or from the person who acted as the prosecuting attorney in that case, a certificate expressive of an opinion that said

record, obtained from the clerk, contains a full and true history of the proceedings on the trial ; Third, the record so obtained and certified must then be presented to the Supreme Court, or if it be in vacation of the court, to one of the justices thereof.

Before the presentation to the court or judge, the rule now requires that the record be filed with the clerk. If the court or judge be of opinion, on examination of the record and the assignment of errors appended thereto, that reasonable grounds exist therein for an allowance of the writ of error, an order is made by indorsing the same on the back of the transcript, and the *supersedeas* is issued by the clerk.¹

The procedure after *supersedeas* on writ of error is practically the same in both civil and criminal cases

EFFECT OF SUPERSEDEAS — BAIL.

SEC. 165. The allowance of a *supersedeas*, which is served on the sheriff or, if the prisoner have been committed to the penitentiary, on the warden thereof, is merely to suspend the execution of the sentence. It does not discharge the defendant from custody. If the offense be a bailable one, and the court or justice be of the opinion that he ought to be admitted to bail until the determination of the writ of error, the court or justice may make an order that defendant be discharged from custody upon his entering into a recognizance to the people of the State, before the

¹ Mills' Ann. Stat., §§ 1478-1479.

sheriff of the county where he or she shall be imprisoned, in such sum and with such security as said court or justice shall prescribe. Said recognizance shall be conditioned that the prisoner will appear in the next District Court to be holden in the county where the trial of the prisoner took place, and each subsequent term of such District Court on the first days thereof, until the determination of the writ of error, and that he will be present and submit to such order as the Supreme Court shall make in the premises, and will not at any of the terms of said court in which he shall be bound to appear by said recognizance, depart the court without leave.

After service of the *supersedeas*, the procedure as to *scire facias*, filing of abstract, and briefs, arguments, oral and written, etc., is the same as in civil cases. The *scire facias* is served on the attorney-general, as representing the State, under the provisions of section 1783 of Mills' Statutes. He prepares all briefs on behalf of the State, and represents the prosecution on the oral argument of the case.

DECISIONS OF SUPREME COURT AS TO WHAT IS REVERSIBLE ERROR IN CRIMINAL CASES.

SEC. 166. Where the transcript of the record does not show that the indictment was brought into court by the grand jury and presented to the court while it was judicially sitting.

Where the transcript of the record does not show that defendant was arraigned and plead to the indictment.

Where a challenge for cause to a juror on the regular panel of jurors for the term is sustained on behalf of the prosecution on insufficient grounds whereby the regular panel is depleted and recourse is necessarily had to a tales to fill up the panel, and complete the trial jury, over the objection of the defendant.

To try a person charged with the commission of a misdemeanor, the punishment of which is imprisonment, in his absence and that of his attorney.

Where the transcript of a bill of exceptions, purporting to set out all evidence heard at the trial, does not contain any evidence showing where the offense was committed.¹

It is held that the failure to read the indictment or information to the accused is at most an irregularity, and not fatal error, since the statute requires that he be furnished with a copy of the indictment or information, which is a better means of informing him of the nature of the charge preferred against him than the reading of the indictment would be.

So it is held that a failure to furnish a list of the witnesses and trial jurors at the time of arraignment, and before plea, is not fatal error, if it appear from

¹Thornell v. People, 11 Colo. 305; Ray v. People, 6 Colo. 231; Stratton v. People, 5 Colo. 276; Mooney v. People, 7 Colo. 218; Lawn v. People, 11 Colo. 343.

the record that such lists were furnished a reasonable time before entering on the trial, and there is nothing in the record to show that the prisoner was put to a disadvantage or surprised, or his rights prejudiced by the failure to furnish such list prior to plea.

So it is held that the finding of the court of the fact of the juror's indifference is not a cause of assignment of error.¹

So it is held fatal on error, that the prisoner was deprived of the privilege of being present when the verdict is returned into court.

So when the prosecuting attorney argued on matters outside of the record, totally irrelevant to the matters at issue, and which had not been admitted in evidence, in his closing speech to the jury, over the objection of defendant's counsel, and exception was duly taken thereto and reserved, it was held fatal error.²

So in a prosecution for receiving stolen goods, the failure to prove the ownership of the goods, and the alleged corporation's *de facto* existence, where a corporation is alleged to be the owner of the stolen goods, is fatal error.³

¹ Minich v. People, 8 Colo. 440 ; Wilson v. People, 3 Colo. 325 ; Solander v. People, 2 Colo. 48 ; Jones v. People, 2 Colo. 351.

² Smith v. People, 8 Colo. 157.

³ Miller v. People, 13 Colo. 166.

PROCEDURE AFTER JUDGMENT OF SUPREME COURT.

SEC. 167. The Court of Appeals has concurrent jurisdiction with the Supreme Court in all criminal cases, except those in which the sentence of death has been pronounced, of which the jurisdiction of the Supreme Court is exclusive. The procedure as is above pointed out is, therefore, applicable to both the Supreme Court and the Court of Appeals in all cases of misdemeanors and felonies non-capital.

In capital cases upon affirmance of the judgment of the trial court, the Supreme Court, by the statute, fixes the time for the execution of the sentence, which, under the present law, is carried out at the State penitentiary, in the manner pointed out by the statute, and the copy of the order of the Supreme Court is the warrant to the warden for the execution of the sentence.

In other cases, non-capital, the Supreme Court or Court of Appeals is required to remit the cause to the District Court, whose judgment it has reviewed, and direct that court to carry into effect the judgment affirmed.

The application for a rehearing is the same as for making the application and the mode of doing so in civil cases.

In criminal causes, however, heard by the Court of Appeals, a writ of error lies to the Supreme Court, but the same must be sued out within sixty days after

the final judgment of the Court of Appeals is rendered, as provided by the Court of Appeals Act. In suing out this writ of error the course pursued in suing out the writ of error from the District Court, as hereinbefore set forth, must be pursued. All the provisions of the statute regulating the procedure on writ of error in criminal cases are found in sections 1478 and 1479 of Mills' Annotated Statutes. The provisions of the Civil Code, section 78, are not applicable to criminal procedure.

CHAPTER XI.

Of Appeals.

SEC. 168. Appeal from District and County Courts.

- 169. Appeal — What is an.
- 170. An appeal, how taken — Procedure
- 171. When an appeal will lie.
- 172. To what courts an appeal lies.
- 173. Direct appeal to Supreme Court.
- 174. Decisions as to franchise and freehold.
- 175. Joint appeal, when maintainable.
- 176. The appeal bond, form of.
- 177. Appeals, when allowed without bond.
- 178. Appeal bonds amendable.
- 179. Appeal to be docketed, when.
- 180. When jurisdiction of court attaches
- 181. Procedure by appellee.
- 182. Appeal, when dismissed.

APPEALS FROM DISTRICT AND COUNTY COURTS.

SEC. 168. Appeals to the Court of Appeals or Supreme Court from the judgment of a County Court, or of a District Court, lie in all civil cases, where the judgment of the trial court is a final judgment, and for an amount such as the statute specifies as necessary to give the appellate court jurisdiction of the appeal.

This chapter has no relation to and does not treat of appeals taken from the County Court to the Dis-

strict Court of the same county for the purpose of a trial of the issues of fact *de novo*.

By the act of 1887 (Code, § 388), no appeal could be taken to the Supreme Court, unless the amount of the final judgment exceeded one hundred dollars, but this limit to the jurisdiction, as applied to the Court of Appeals, seems to be held by the latter court not to be in force under the act of 1891, establishing the latter court, since it has repeatedly entertained jurisdiction of cases wherein the amount for which the judgment given by the trial court was considerably less than one hundred dollars.

But to take an appeal to the Supreme Court from a final judgment of a trial court or of the Court of Appeals, it is now necessary that the amount for which the judgment is rendered by the trial court, or by the Court of Appeals, shall exceed two thousand five hundred dollars, or that the matter in controversy shall relate to a franchise or to a freehold, or that to a proper and correct decision of the case it shall be necessary for the court to give a construction to some provision of the Constitution of the United States or of the State of Colorado. As to these matters see *ante*, FINAL JUDGMENT," etc., pp. 58-66.

APPEAL — WHAT IS AN.

SEC. 169. An appeal is a proceeding, by which a civil cause, either legal or equitable in its nature, which has

progressed to a final judgment or decree in a *nisi prius* court against one of the parties litigant, is removed to the court of review for the purpose of having the judgment or decree of the trial court and its ruling and decisions during the progress of the trial, reviewed by the appellate court on the transcript of the record and proceedings of such *nisi prius* court.

The appeal here under consideration differs essentially from the appeal, allowed by the statute, from the County Court to the District Court of the same county, in this, that the latter appeal, when duly perfected, vacates the judgment of the County Court in that action, and the cause is again triable in the District Court, in the same manner as if no trial whatever had been had in the County Court. On the trial on such appeal, the witnesses are again produced in court, sworn and examined by each party to the litigation, in the same manner as if the case had been commenced in the first instance in the District Court, and all proceedings are conducted in the same manner as if it were an original case in the District Court, except that the jurisdiction of the District Court, in that case, is limited to the sum of two thousand dollars, the jurisdictional limit of the County Court.

On such appeal the District Court does not sit as a court of review of the record and proceedings had in the County Court.

But the appeal from a *nisi prius* court to a court of review is wholly different. In such appeal the judg-

ment of the trial court is merely suspended in its execution in the same manner as when a *supersedeas* is allowed on proceedings in error. The record of the trial court is removed by a certified transcript thereof to the court of review, and is there examined, and the proceedings therein set forth reviewed by the appellate court, without any other or further hearing of evidence. The record as transmitted, including the bill of exceptions, is all that is properly before the court for review, and it has no power to go outside of such record for testimony or other matters to govern it on the appeal.

Except in the mode of removing a cause to an appellate court, and the proceedings attendant on such removal, there is in the Colorado practice but little, if any, difference between the proceeding on error and on appeal.

An appeal, as constituted by the statute of Colorado, was unknown to the common-law practice, and is wholly a creature of the statute, by which it is given. The court and parties to the litigation in the trial court must look to the statute alone and be governed wholly by it in ascertaining if the right to appeal from the judgment exist in favor of the party, who desires to appeal, and in the mode of obtaining such appeal.¹

¹ *Luthe v. Luthe*, 12 Colo. 429; *Cleland v. Tanner*, 8 Colo. 252.

AN APPEAL—HOW TAKEN—PROCEDURE.

SEC. 170. As an appeal lies only in civil cases, the Civil Code provisions must be looked to for the law governing the right and mode of taking an appeal from the judgment of the trial court to a court of review. The Code prescribes :

First. That the party who desires to take an appeal, pray the trial court to allow the appeal within five days after the rendition of the judgment from which the appeal is sought.

Second. That the appellant give a good bond in a sum sufficient to cover the amount of the judgment appealed from, conditioned as prescribed by the Code. Upon a compliance with these conditions the appellant is entitled to take his appeal as a matter of right. It seems that the trial judge in allowing the appeal has no discretion to refuse to allow an appeal, if the cause be appealable, and the party be ready and willing to give the required bond. His discretion is exercisable only on the question of the amount of the bond to be given ; the time within which such bond shall be filed and approved, and the sufficiency of the sureties thereon. If, however, the cause be not appealable for any cause, or the application for the allowance of the appeal be not made within the time prescribed by the statute, the trial court may properly refuse to allow the appeal. It seems also that no provision whatever is made by the statute for

allowing an appeal after the expiration of the time prescribed. In all such cases the party is remitted to his writ of error.

The course of procedure to take an appeal from a trial court to one of the courts of review is: First. To make an application to the court by which the judgment is rendered, for such appeal, within *five* days from the day on which the judgment is announced by the judge in open court.

The prayer or request for allowance of the appeal must be made to the court, by which the judgment is rendered. Thus, while in Arapahoe county there are five district judges, sitting for the trial of causes, civil and criminal in separate divisions, each judge sits as a separate and distinct court, as fully as if he were the sole district judge of Arapahoe county, and when a judgment is rendered by him, whether it be on the verdict of a jury, or on a trial by the court, the application for an allowance of an appeal therefrom must be made to him, and cannot be made to one of the other judges. So when the trial is had before the judge of another judicial district, sitting for the judge of the district, the application for allowance of the appeal must be made to the judge who tried the cause, and not to the judge of the district.

Second. The application must be made within *five* days from the rendition of the judgment.

Under section 224 of the Code, the clerk of the trial court is required to enter judgment, when the

trial is had by a jury, within twenty-four hours after the rendition of the verdict, unless the court order the case reserved for argument or further consideration, or grant a stay of proceedings. But the entry of judgment does not prejudice the right to move for a new trial in due time.

Under the ordinary common-law practice a motion for a new trial will stay the entry of the judgment, but this is not so by the Code of Procedure, unless a special order of the court is obtained staying the entry of the judgment.

In all cases, whether of trial by jury or by the court, if the court render judgment in the action, the appeal must be prayed within *five* days from the day on which such judgment is announced, since a judgment is a judicial act, what is considered and ordered by the court, and it is effective from the day of its announcement, though the clerk may not enter it of record for some time thereafter. In the computation of the *five* days, the day on which the judgment is announced is not counted under section 382 of the Code.¹

Prior to the amendment to the Code of 1889, the prayer for an appeal could only be made while the court was sitting judicially, for the transaction of business. If the court had adjourned for the term, though the judgment, from which the appeal was

¹ Gruner v. Moore, 6 Colo. 526; Sieber v. Frink, 7 Colo. 151; Gaynor *et al.* v. Clements, 16 Colo. 213.

sought, had been rendered during the last hour of the term, unless the appeal was then prayed and allowed, the right of appeal was lost. To remedy this defect in the law, the Code amendment of 1889 provides that the prayer for an appeal may be made to and the order therefor be made by the judge in vacation, in all cases where the court is not sitting judicially during the whole of the five days allowed for praying the appeal. To avail of this amendment, the court must have adjourned for the term, before the expiration of the five days after the rendition of the judgment. An application for the allowance of the appeal cannot be made at chambers, during the term, nor can the judge allow an appeal at chambers, before the court has adjourned for the term. The conditions necessary to an allowance of an appeal at chambers are: First. That the five days since the rendition of the judgment have not expired when the prayer for appeal is made. Second. That the court in which the judgment was rendered, has adjourned for the term.

If the court be in session, or the court have not adjourned for the term, though it may have adjourned for a few days only, the appeal can be allowed only by the court, as prior to the amendment of 1889.

At the time of allowing the appeal, the court, or judge, if it be allowed at chambers, usually prescribes the time within which the appeal bond is to

be filed and approved, and the bill of exceptions signed and filed.

Second. After the allowance of the appeal by the court or judge, the appellant must, within the time fixed in the order allowing the appeal, prepare his appeal bond or undertaking, which must be in the penal sum prescribed by the court or judge, and conditioned as required by law, and present himself to the clerk or other person designated by the court in the order as the person, who shall approve the bond, for examination as to the sufficiency thereof. The clerk is required by the Code to satisfy himself of the sufficiency of the sureties, and usually requires them to make the affidavit prescribed by section 421 of the Code as to their sufficiency. The bond must run to the adverse party in the action. If the clerk approve the bond, he indorses his approval of it thereon and files it with the other papers in the action. By such approval the cause is transferred to the court of review, proceedings in the trial court in execution of the judgment are stayed, and the latter court is divested of its jurisdiction for all purposes in that action, except that of correcting errors in the record.¹

The appeal bond is said by the Supreme Court of Illinois to be in the nature of process, by which the cause is transferred from the trial court to the court of review. By the due execution and approval of the appeal bond, where the cause is appealable,

¹ *Hurd v. People*, 14 Colo. 210; *Eicholz v. Wilbur*, 4 Colo. 435.

the court of review acquires jurisdiction of the appeal, and of the parties who take the appeal. From the filing of the appeal bond in the trial court to the final decision of the court of review, all matters, other than such proceedings as are necessary to correct the record of the trial court, must be brought before the court of review. The filing of the approved appeal bond is notice to the trial court that it is divested of all jurisdiction in the cause, and that the court of review alone has jurisdiction.

WHEN AN APPEAL WILL LIE.

SEC. 171. The Code provides that an appeal lies only, when the judgment sought to be appealed is a "final judgment." See "FINAL JUDGMENT," § 61, *ante*.

Hence, a judgment to be appealable must determine the substantial matter which is in controversy in the action, must adjudicate the merits of the party's case and dispose of his claims as set forth by his pleadings in the action. It must put an end to all controversy on the merits as between the parties litigant, though there be some matter, incidental or dependent, which the court reserves for supplemental decree. Such a reservation, if not of matters affecting the merits, will not prevent the judgment from being a final judgment. Hence an appeal does not lie from any interlocutory order entered during the progress of the cause, or from any order, ruling or

decision which the court makes in the cause prior to the final judgment. All such orders, rulings and decisions are reviewable only on appeal from the final judgment.

An appeal does not lie in a criminal case, or on a final judgment in a contempt case, or from a judgment of ouster in a case relating to a public office, in a proceeding by *quo warranto*.¹

So an appeal does not lie by the plaintiff, on a judgment in his favor, even though he be aggrieved thereby. His sole remedy in such case is by a proceeding in error.²

So an appeal will not lie from an order made after the rendition of the final judgment, unless such order be made within five days, since an appeal from such judgment is required to be made, or at least allowed, within five days after such judgment. If it is sought to review such an order, it must be by writ of error only.

Since the establishment of the Court of Appeals, and the provision that an appeal or writ of error from the Supreme Court lies in a certain class of causes, the question arises whether a judgment of the Court of Appeals, which reverses and remands a cause to the trial court, is such a final judgment as will authorize an appeal therefrom to or a writ of

¹ Teller v. People, 7 Colo. 451; Londoner v. People, *ex rel.*, 15 Colo. 246.

² Hall v. Mining Co., 6 Colo. 81; Vallette v. Mining Co., 11 Colo. 204.

error from the Supreme Court. The question has not yet been passed upon by the Supreme Court of Colorado. But it seems from the current of authorities that such a judgment is not ordinarily a "final" judgment from which an appeal will lie.¹ The judgment of the Court of Appeals must, however, be considered. If it be a judgment reversing the judgment of the trial court and remanding the cause for further proceedings in conformity with the opinion of the appellate court, it would seem that such a judgment is not final and, therefore, not appealable. The object for which the action is remanded to the trial court is to give to that court an opportunity to correct the errors complained of on another trial. While the opinion rendered may be final, as to the views of the appellate court, the judgment merely sends the case back to the trial court for another trial, and the judgment of the appellate court bears a close analogy to the decision of the trial court, when it grants a new trial under the Code. But if the judgment of the Court of Appeals disposes of the cause on its merits, and merely remands the cause to the trial court, that the latter may perform a duty imposed upon it by the judgment, such as entering a correct judgment, or dismissing the cause for want of merits, and no discretion is allowed the trial court as to its action, after such remand, it seems that such a

¹ Jones v. Fortune, 128 Ill. 520; Virginia v. Brewing Co., 136 Ill. 617.

judgment of the Court of Appeals would be a “final” judgment, from which an appeal may be taken in proper cases to the Supreme Court.

An appeal to the Supreme Court from a final judgment of the Court of Appeals lies only in such cases as might have been taken originally to the Supreme Court from the trial court, under the first section of the act of 1891 in relation to courts of review. The statute prescribes no particular mode of procedure for taking such appeal, and merely fixes the time within which such appeal shall be taken, that is, sixty days from the rendition of judgment of the Court of Appeals. All other matters, such as the amount of bond, and by whom approved, when to be filed, etc., are left to be regulated by the court.

TO WHAT COURTS AN APPEAL LIES FROM THE JUDGMENT OF THE TRIAL COURT.

SEC. 172. Under the statute of 1891 a party desiring to appeal from the judgment of the trial court has, in many cases, an election of two courts to which he may take an appeal. From judgments of the County Court he can appeal to the Court of Appeals only, though if he desire to go directly to the Supreme Court from the County Court, he can do so by writ of error, under a provision of the Constitution.

As the constitutional limitation of the jurisdiction of the County Court in civil cases is two thousand

dollars, the judgment of the Court of Appeals on an appeal from the County Court is *final* under the act of 1891. But as the Court of Appeals does not regard the one hundred dollar limitation of the Code on the jurisdiction of the Supreme Court, prior to the act of 1891, as applying to it, he may take an appeal to the Court of Appeals for any sum whatever within the jurisdiction of the County Court. But appeals from judgments of District Courts are divided into two classes. *One class* is composed of causes wherein the money limit of the judgment is twenty-five hundred dollars or less. In this class of causes all appeals go to the Court of Appeals exclusively, and are not removable to the Supreme Court from either the trial court or the Court of Appeals.

The *second class* of causes are those wherein the money judgment exceeds twenty-five hundred dollars, causes involving a franchise or freehold, or requiring of the court a construction of some provision of the Constitution of the State or of the United States, and criminal causes. Any such case may be taken either to the Court of Appeals or to the Supreme Court directly. So in this class of causes an appeal lies from the judgment of the Court of Appeals in civil cases, and a writ of error in both civil and criminal cases from the Supreme Court. In this latter class of causes the appellant has the privilege, of which he may avail himself if he desires to do so, of having his case reviewed by both courts of review.

If his allegations of error are not sustained by the Court of Appeals, he may be more successful in the Supreme Court. .

DIRECT APPEAL TO SUPREME COURT.

SEC. 173. Besides the money amount of exceeding twenty-five hundred dollars, for which the judgment was rendered, the statute of 1891 allows an appeal directly to the Supreme Court, when the action in the trial court involves a "franchise or a freehold."

A franchise is defined to be "a particular privilege conferred upon individuals by the government," and is usually conferred upon corporations for the purpose of enabling them to carry out the objects of their incorporation. The franchise is vested in the corporation as a distinct entity, as distinguished from the officers of such corporation. Public offices are held not to be included in the term "franchise."

A freehold involves the title *in fee* to the parcel of land.

To authorize an appeal, either from the trial court or from the Court of Appeals to the Supreme Court, on the ground that the controversy *involves* a franchise or a freehold, the Supreme Court, following the decisions of the Supreme Court of Illinois, holds that the franchise or the right of freehold must be *directly*, not incidentally or collaterally, the subject of the action.¹ So it will be held that no appeal lies to the

¹ *Londoner v. People*, 15 Colo. 247; *Brandenburg v. Reithman*, 7 Colo. 324; *Malaer v. Hudgens*, 130 Ill. 229.

Supreme Court on the ground that the case involves a construction of a provision of the Constitution of the State or of the United States, unless a construction of a provision thereof is indispensable to a correct adjudication of the principal question involved in the action.

DECISIONS AS TO FRANCHISE AND FREEHOLD.

SEC. 174. The word "franchise" as used in the statute of appeals to the Supreme Court, means a privilege emanating from the sovereign power of the State, owing its existence to a grant or to prescription, and investing in individuals or the body politic something not belonging to the citizen of common right. The right to be a corporation by a particular name is a franchise.

An information in the nature of a *quo warranto* against persons claiming to act as drainage commissioners, on the ground that such district has not been legally organized, involves a franchise.¹

A bill for dower, under the Illinois statutes, involves a freehold. So a proceeding to maintain a permanent easement to the half of an adjacent lot, and to keep the same free from buildings, which will bar light, and expose the buildings on adjacent lot to danger of fire, involves a freehold.

¹ Hazel B. Co. v. Hazel T. B. Co., 137 Ill. 233; People v. O'Hair, 128 Ill. 22.

A freehold is involved whenever the necessary result of the judgment is that one party to the litigation gains and the other party loses a freehold estate. So when the pleadings so put the title in issue that a decision of the case necessarily requires a decision of this issue, although one party does not lose and the other gain a freehold estate by the final judgment. So where the court on the evidence determines that one party holds the title, and by the final decree sets aside the deeds, under which the adverse party claims title, a freehold is involved. So a freehold is involved in a complaint to impeach a decree rendered in a proceeding in partition. So a freehold is involved in a condemnation proceeding under the Eminent Domain Act, where one party owns the title in fee to the land sought to be taken.²

Where a franchise or freehold is involved the cause may be taken to the Supreme Court directly by appeal or writ of error without regard to the amount involved in the suit," but unlike the appellate courts of Illinois, which have no jurisdiction in such cases, the Court of Appeals of Colorado has concurrent jurisdiction with the Supreme Court, and may determine such a case, subject to an appeal to the Supreme Court from its judgment.

¹ Sanford v. Kane, 127 Ill. 391; Ryan v. Sanford, 133 Ill. 296; Goodkind v. Bartlett, 136 Ill. 19; Nichols v. Otto, 132 Ill. 96; Walker v. Doane, 131 Ill. 41; Tinker v. Forbes, 136 Ill. 234; Stunz v. Stunz, 131 Ill. 321.

² Santord v. Kane, 127 Ill. 594.

JOINT APPEAL—WHEN MAINTAINABLE.

SEC. 175. Under the act of 1889, a joint appeal to the appellate court will not lie in any case, unless as to each appellant the trial court has rendered a final judgment, in amount sufficient to entitle each to an appeal therefrom. The provision of the Code, by which one of several defendants is authorized to appeal to the court of review, and to use the names of his co-defendants, if necessary, does not affect this rule. In praying an appeal the defendants should pray a joint and several appeal and have the order show that the appeal is joint and several, or one of the defendants alone cannot prosecute such appeal. A joint appeal must be prosecuted by all the defendants, who join in the execution of the appeal bond.⁴

THE APPEAL BOND—FORM OF.

SEC. 176. On praying an appeal, the party appealing is required to execute a good and sufficient appeal bond or undertaking, in an amount specified by the court in the order, which bond runs to the adverse party in the action, and must be approved and filed in the trial court within a specified time.

The bond is in the following form :

Know all men by these presents, that we — and —, all of the county of — and State of Colorado, are held and firmly bound unto — in the penal sum of — dollars, lawful money of the

⁴ Diamond, etc., Co. v. Faulkner, 14 Colo. 438.

United States of America, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents :

Sealed with our seals at —, this — day of —, A. D. 18—.

The condition of the above obligation is such that :

Whereas, The above-named — did at a term of the — Court, then being holden in and for the county of —, in the State of Colorado, on the — day of —, 18—, recover a judgment against the above-bounden — for the sum of — dollars and the costs of suit, from which judgment the said — has prayed and been allowed an appeal to the (here designate the appellate court) of said State,

Now, if said — shall duly prosecute said appeal with effect, and shall pay the amount of said judgment, costs, interest, and damages, rendered and to be rendered against him, in case said judgment shall be affirmed by the said court, then the above obligation to be void, otherwise to remain in full force and effect.

— —. [SEAL.]

— —. [SEAL.]

The approval of the bond is indorsed on said bond as follows:

Approved by me this — day of —, A. D. 18—.

— —,
Clerk.

The indorsement of approval should be made before the bond is filed in the clerk's office, though it has been held that if the clerk retain the bond without indorsing a formal approval thereon, and transmit a copy thereof with the transcript to the court of review, the absence of the formal approval indorsed on the bond will not be fatal to the appeal, since the indorsement is only evidence of the approval, and

the act of the clerk in retaining the bond and transmitting it to the appellate court is the equivalent of the formal indorsement.

By filing the approved appeal bond in the trial court the appeal is "made," and thereafter all proceedings are to be had in the court of review.

APPEALS — WHEN ALLOWED WITHOUT BOND.

SEC. 177. The Code, section 395, authorizes the trial court to dispense with security on appeal, when the appellant is an executor, administrator, trustee or other person acting in another's right. But this should be done by a formal order entered of record showing that the appeal is allowed, without the appellant being required to give security, for the reason that such appeal is on behalf of the estate for which appellant is executor, etc.

In cases where a municipal corporation, such as a city or town, in its corporate capacity, desires to appeal from a judgment rendered against it in a court of record, it is authorized to do so by the Code without giving a bond. It would seem also that it may appeal from a judgment in its favor, as well as a judgment against it, since not being required to give any bond, the reason of the decision that a plaintiff cannot appeal from a judgment in his own favor does not exist in such case.

APPEAL BONDS TO COURT OF REVIEW AMENDABLE.

SEC. 178. By section 388 of the Code the court of review is authorized to allow *defective* appeal bonds to be amended. If, therefore, the bond approved by the clerk be found, after its transmittal to the court of review, to be defective in any particular, the defect may be cured by permission of the court of review. The objection to the sufficiency of the bond filed is made by a motion on the part of the appellee to dismiss the appeal, on the ground that the appeal bond is defective or insufficient. This motion must be supported by affidavits showing that the sureties on the bond are not sufficiently responsible for the amount mentioned in the bond. The appellant will then meet such affidavits by counter affidavits of the sureties, which should specifically state the nature and character of their property, its nature, location, cash value, incumbrances and every thing in relation thereto that will enable the court to judge advisedly of their sufficiency as sureties. If the court find them to be insufficient, it will then be in order for the appellant to ask leave to file a new and sufficient bond. Whether the court has power to allow a *new* appeal bond to be filed is doubtful, since the statute applies only to defective appeal bonds and their amendment; but if the court allow such an appeal bond to be filed, the appellant is estopped from calling such order in question in an action on such bond,

as he has the benefit of the appeal in consequence of the order of the court.

If the new bond is executed by an attorney in fact, the rules of the court require that the power of attorney originally given be filed with the bond in the office of the clerk of the court of review, unless such power of attorney contain other powers besides the power to execute the bond in question. In such case the rule requires the original power of attorney to be exhibited to the clerk, and a copy thereof certified by the clerk to be a true copy, to be filed in his office.¹

This rule applies only to bonds filed originally in the court of review, and not to bonds filed in the trial court.

APPEAL TO BE DOCKETED—WHEN.

SEC. 179. After the appeal has been taken by filing the approved bond in the trial court, the appellant will next procure from the clerk of the trial court a transcript of the record of the cause, as hereinbefore stated in case of a writ of error, and attach thereto an assignment of errors. "See RECORD AND ASSIGNMENT OF ERRORS," *ante*, §§ 89-114. The transcript is to be procured by the appellant, as in case of a writ of error. The appeal being a continuation of the original action, and the appeal bond being the process by which the transfer to the court of review is effected,

¹ Rule 7 of Supreme Court.

the duty of seeing that every step is properly and timely taken devolves on the appellant.

He must lodge the transcript of the cause in the office of the clerk of the court of review within the time specified by the statute, or his appeal may be dismissed for want of prosecution. The Code requires that an authenticated copy of the record appealed from be lodged in the office of the clerk of the court of review on or before the third day of the next term of the appellate court. Provided, that, if there be not *thirty* days between the time of making the appeal and the next term of the appellate court, the transcript of the record must be lodged with the clerk on or before the *third day* of the next succeeding term of the appellate court, unless further time shall be granted by the appellate court for good cause shown.

The time of "making the appeal" is construed to be the time given by the trial court for preparing and filing the appeal bond in that court. Thus, if the order allowing the appeal be made on the fifth day of May, and gives twenty days within which to "make the appeal," the appellant may file his bond on the twenty-sixth day of May. The appeal is then "made" on May 26th. The courts of review convene in regular terms on the second Monday in the months of January, April and September. Hence, if the appeal is made on May 26th, the appellant is not required to lodge his transcript with the clerk until

Thursday after the second Monday in the month of September following. But if the appeal be "made" in the latter part of February, or in the early days of March, so that thirty days will elapse between the day of the "making" of the appeal and the first day of the next April term of the court of review, the transcript must be lodged with the clerk on or before the Thursday next succeeding the second Monday in the month of April following, unless further time is given by the court for good cause shown.

It seems that the application for further time is to be made during the *first three days* of the term at which the transcript ought to be filed. The rule of the courts is to regard the words "for good cause shown" to require in ordinary cases an affidavit, which shows that by the use of reasonable care and diligence the appellant was unable to procure a transcript of the record in time to file it on or before the time specified. The good cause will be absence of the clerk of the trial court, or his sickness, or inability to prepare a transcript by reason of press of business during a term of court. But the court will look unfavorably upon an application for an extension of time if the appellant wait until the last days of the period allowed before he applies to the clerk for the transcript.

WHEN JURISDICTION OF COURT OF REVIEW ATTACHES ON APPEAL.

SEC. 180. To give the court of review jurisdiction to make an order in a case appealed to it from a court of record, a duly authenticated transcript of the proceedings had in that court must first be filed in the court of review, to which the appeal was taken. This transcript must show affirmatively: First. That the cause appealed is one in which, by the statute, an appeal is authorized to be taken to that court of review. Second. That a final judgment has been pronounced in that action by the trial court. Third. That the party who appeals is not the party in the trial court in whose favor the judgment was given. Fourth. That an appeal was prayed within the time prescribed by the statute, and allowed by the trial court. Fifth. That the appeal bond required has been duly executed, in the penal sum fixed by the court with the conditions prescribed by the statute, and the security thereon has been approved by the person designated by the court to approve such bond. Sixth. That the bond has been presented within the time allowed by the order granting the appeal, and duly filed.

Each and every one of the above matters must appear in the transcript filed, before the court of review can take jurisdiction to make any order in the case as an appealed case. The jurisdiction of the

court of review must be clearly shown to have attached, before it can take any action therein.

A strict compliance with the requirement of the statute, that the appeal be prayed within five (5) days is required, and the District Court has no authority to allow an appeal if it be prayed after the expiration of that time.

But an appeal may have been duly prayed and, through an inadvertence of the clerk, the entry of the order allowing the appeal may have been omitted in the record. In such case the trial court will have power to make the order *nunc pro tunc*. But if it affirmatively appear from the record filed that the appeal was allowed by the trial court, after the expiration of the time prescribed by the statute, and nothing appears on the record to show that the order allowing the appeal was an order made *nunc pro tunc*, the court of review will be without jurisdiction of the appeal. Allowance of the appeal is a judicial act, which must be made by the court, hence a stipulation of the parties cannot give the court jurisdiction of an appeal, in the absence of a judicial order, or authorize an extension of the time within which an appeal may be prayed and allowed.

So it must affirmatively appear that the bond was approved and filed within the time given by the trial court for filing it. Great strictness as to filing bond within the prescribed time is exacted. But if the appellant file a brief or abstract before objecting that

the bond was filed out of time, he will be held to have waived the objection, and a motion to dismiss on account of failure to file bond in apt time will be denied.¹

It must be remembered that the court of review must look only to the record for all the above items of information, and cannot go outside of it or permit other sources of information to influence its decision. Hence if the transcript insufficiently state any of the above matters, or state them incorrectly, the remedy must be sought by an application to the trial court for an amendment or correction of its record. If matters, that deprive the court of review of jurisdiction to entertain the appeal, appear on the face of the record, and no suggestion of an error in the transcript is made the court will *sua sponte* dismiss the appeal for want of jurisdiction.

If appellant fail to file his transcript in compliance with the statute, or within the further time, if any, allowed him by the court, the appeal may be dismissed. It is held that the further time for filing record cannot be given by stipulation of counsel, but must be given by an order of the court and before the time prescribed by the statute for filing it expires. But where a stipulation of counsel is entered into, extending the time for filing the transcript, such stipulation should be brought to the attention of the court, and an order extending the time based on such stipulation asked of the court.

¹ Win. Pap. Co. v. Bank, 33 Ill. App. 631; Fairbank v. Streeter, 41 Ill. App. 436.

PROCEDURE BY APPELLEE.

SEC. 181. No *scire facias* or summons to hear errors, or notice of any kind whatever that the appeal has been perfected by appellant is required to be given to the appellee. The appeal being but a continuation of the original action transferred to the court of review by the appeal,¹ the appellee is held to have notice of that transfer by the filing of the appeal bond in the trial court, and to be obliged to follow up the cause into the court of review, without service of any notice upon him. The law as to notice of appeal from County to District Courts does not apply to appeals to courts of review. Hence, if appellee desire to resist the appeal, he must enter his appearance in the appellate court by a joinder in error, or by some other proper action in the appellate court.

APPEAL — WHEN DISMISSED.

SEC. 182. Before joining in error the first step to be taken by appellee is to apply for a dismissal of the appeal, if there be any ground for such dismissal.

The first ground for making such application will be the failure of appellant to lodge his transcript within the time prescribed by the statute; or, if an extension of time be given, within the further time

¹ Connor v. Est. of Connor, 4 Colo. 74; Colo. Spgs. v. Cowell, 6 Colo. 73.

allowed. The application is to be made only after the time for filing has fully expired; that is, on or after the *fourth* day of the term. No rule of court requires written notice of the motion to be given to appellant, but it is apprehended that such a motion ought not to be entertained without proof of such notice under the Code. The appellant has entered his appearance by filing his appeal bond,¹ and is entitled to notice of all motions in the case. The case seems to be decided in this view by the case of *Cates v. Mack*, 6 Colo. 401, where it was held that the County Court should not dismiss an appeal without notice, as appellant is in court by the filing of his appeal bond. The giving of such notice will not enable the defaulting appellant to file his transcript before the motion is heard and thus render the motion ineffective. Nor will the court give leave to file the transcript after the statutory time has expired, on a motion made after the expiration of that time, courts usually holding that no extension of time to do an act is grantable after the adverse party has acquired a right to a default for failure to perform that act. This view seems to be supported by the case of *Straat v. Blanchard*, 14 Colo. 445.

On such motion, after due notice, under rule 12 of the Supreme Court, appellee will present to the court of review a transcript of the judgment, the

¹Wyatt v. Freeman, 4 Colo. 14; Swensen v. Ins. Co. 4 Colo. 475.

order allowing the appeal, the appeal bond and its approval, duly certified under the hand of the clerk and seal of the trial court, in support of his motion to dismiss. If it appear from such transcript that the time for filing the record in the court of review prescribed by the Code has expired, and from the record of the appellate court it is found that no transcript of the record *is* filed with the clerk, and that no application for an extension of time has been made and is then pending, the court of review will dismiss the appeal.

Another reason for requiring notice of the motion to dismiss is that the appeal may be dismissed "without prejudice" to appellant's right to proceed by writ of error. He may have inadvertently neglected to file his transcript until the time for doing so has expired, and yet on the hearing of the motion to dismiss, which he may be unable to effectually resist, he may desire that the case be heard on error, and ask the proper order in that case.

An appeal may be dismissed because the action or proceeding is one from which an appeal will not lie to either court of review. Or, because the jurisdictional amount required for an appeal to the Supreme court does not exist. Or, because it appears on the face of the transcript that the appeal was prayed and allowed after the expiration of the five days, or by the judge at chambers before the adjournment of the court for the term. Or, because the

transcript shows that no final judgment has been given by the trial court.¹

So where the appeal bond taken by the clerk of the trial court is found to be substantially defective, and appellant has been ruled to file an amended bond, and has failed to comply with such rule, the appeal may be dismissed on motion.

The appellant may also dismiss his appeal of his own motion, but in such case, if he desire to proceed by writ of error, he must be careful to have the appeal dismissed "without prejudice" under section 397 of the Code.

All motions to dismiss the appeal should be made, when made for any of the foregoing reasons, before joining in error, for in many cases a failure to interpose such a motion will be held a waiver of the objection, if it be one that is capable of being waived.

Where the appeal bond filed in the trial court is substantially defective, a motion to strike the appeal bond from the record is a proper motion, under the opinion in *People v. Adams*, 13 Colo. 550, but it may be met by a cross-motion for leave to amend the bond.

The procedure on joinder in error, and thereafter to the final decision by the court of review, is the same as on writ of error.

¹ *Londoner v. People*, 15 Colo. 247; *Dusing v. Nelson*, 6 Colo. 39; *Shackleford v. King*, 6 Colo. 37; *Higgins v. Brown*, 6 Colo. 148; *Wheeler v. Garrett*, 13 Colo. 550; *Crane v. Farmer*, 14 Colo. 294.

Certiorari as a part of the appellate proceedings in a court of review is not herein treated of for the reason that the Supreme Court, which alone has jurisdiction of such proceeding, as a part of its original jurisdiction, uniformly refuses to issue such writ, if an application therefor can be properly made to any other court of record. Such writ can only be issued to a District Court from the Supreme Court, under its practice, and if the correction of the error, on account of which the *certiorari* is asked, is obtainable by appeal or a writ of error, the Supreme Court will refuse it.

CHAPTER XII.

Of Motions and Orders.

- SEC. 183. What is an order.
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WHAT IS AN ORDER.

SEC. 183. Every direction made by the court or a judge thereof, in an action or proceeding, pending, or about to be commenced, in the court of which he is a judge, and reduced to writing by him or under his direction, which is not included in a judgment in

such action or proceeding, is denominated an *order* by the Code of Civil Procedure.

Sections 371 to 384, inclusively, of the Code of Civil Procedure, relate to the procedure on "Motions and Orders," and it is apprehended that the procedure therein prescribed is equally as applicable to the courts of review, as it is to the inferior courts of record of the State.

In the course of the procedure in the Supreme Court, as well as in the Court of Appeals, each party to the writ of error or appeal will necessarily ask directions of the court, or of a judge thereof when the court is not sitting, in relation to many matters that will arise, in which he may not take action, without asking such direction.¹

WHAT IS A MOTION.

SEC. 184. An application to the court or a judge thereof for an "order" is denominated a "motion" This application may be made either orally, that is by word of mouth in open court, or to the judge, sitting at chambers, or the application may be reduced to writing and filed in the proper court in the cause in and concerning which the "order" is asked.

An oral motion is one made *viva voce* in open court, and is not previously reduced to writing, signed by the party or attorney who makes it, and

¹ Code, § 371; Thorne v. Ornauer, 8 Colo. 353; Mallan v. Higgenbotham *et al.*, 10 Colo. 264; Hughes v. McCoy, 11 Colo. 591.

placed among the files of the cause in which it is made.

A written motion is one that has been reduced to writing, signed by the party or attorney who makes it, and then filed in the cause in which it is made, with the papers pertaining to that cause. But though written and properly filed, the motion must be called to the attention of the court while in session, by *viva voce* application to be heard on such motion. The mere fact of filing it, though it makes it a part of the files in the cause, does not impose on the court the duty of calling up and deciding on the application, until its attention is directed to the written motion on file, and its action thereon requested by one of the parties to the litigation.

MOTIONS — WHERE TO BE MADE.

SEC. 185. In matters pending in trial courts of record, the Code provides that a motion in an action must be made :

First. To the court in which the action is pending, sitting in the county in which the action is for trial at the time of making the motion. This provision applies to the County Courts, to the District Court when sitting in such county, and to the courts of review. As the two courts of review are required by law to sit at Denver, in Arapahoe county, it follows that all motions pending in either of these two

courts must be made in Denver, and can be made and heard at no other place in the State.

Second. If the motion is to be heard at any other place than in open court, at a sitting thereof, it must be made to the judge, not as a "court" but as sitting "at chambers." This provision is applicable only to judges of the District Court, since county judges can do no official business in any other county than that of which they are judges. So a district judge can, under the statute, hear a motion pertaining to an action pending in any county within his judicial district, nowhere except within the judicial district of which he is the district judge. But as the judges of the District Courts are required by law to sit in other judicial districts, if while so sitting, a matter pertaining to an action or proceeding pending in a county of his proper district comes before him for hearing on a motion, it seems that, under the Code, he cannot hear such motion or determine on such application until he returns to his proper district. For all purposes he ceases, for the time being, to be the judge of his own district, and becomes *pro tem.* a judge of the judicial district, in which he is sitting as a judge.

The instances in which an application can be made to a judge of a court of review "at chambers" are few. It is most frequently in cases of an application for a *supersedeas* in a civil or criminal case, which may be made to a particular judge of the court of review,

when the court is not in session, and an application for a writ of *habeas corpus* to an individual judge of the Supreme Court. But in all such cases no provision is made by law for hearing such application at any other place than at the city of Denver. Yet a liberal construction of the words of the Code, "any county in the same district," might permit a motion in a cause pending in a court of review to be heard by a judge of such court at any place in the State, at which such judge may be temporarily sojourning at the time, since the whole State composes only one district for the judges of both courts of review.¹

NOTICE OF MOTION — WHEN REQUIRED.

SEC. 186. The Code provides that "written notice of motions shall be required in all cases, except those made during the progress of a trial." A trial is defined to be a "judicial examination of the issues in the action, whether such issues be issues of law or issues of fact." Hence when an action is pending in a trial court, all motions and applications for orders which are not made during the trial of the issues of fact, whether before a jury or before the court, must be accompanied with a notice in writing to the adverse party, of the nature of the motion, and of the time and place at which such motion will be heard.

¹ Code, § 372.

FORM OF NOTICE OF MOTION

STATE OF ———, }
 County of ———. }

(Court.)

Title of cause.

To ———, above named :

Take notice that on the ——— day of, ——— A. D. 18—, or as soon thereafter as I can be heard, at the incoming of the ——— Court, at ——— o'clock, —. M. of said day, I shall move the court for an order (here state the substance of the order to be applied for, or accompany notice with a written copy of the motion filed or to be filed).

When and where you may appear, if you desire to resist such application.

(Date.)

—————, }
 Attorney for ———.

As, in the courts of review, no trial, properly so termed, takes place in open session of the court, either on appeal or writ of error, the exception seems to be properly applicable only to courts of record, properly denominated trial courts. It follows, therefore, that in strictness of construction all motions made in courts of review should be preceded by a written notice thereof served on the adverse party.¹

There may be a few cases in which the court may make *ex parte* orders in a cause on review, but they will usually be such orders as affect only the party applying for them, and cannot possibly prejudice the adverse party.

¹ Code, § 372.

The notice of the motion is addressed to the adverse party ; states the court in which the motion will be made : the action in which the motion is to be made; and the time and place at which the motion will be called to the attention of the court, and is signed by the party who proposes to make the application, and dated. Such notice is usually accompanied with a copy of the motion, and this is the better practice. If a copy of the motion be not accompanying the notice, the latter should state the nature of the motion, and the grounds that it is to be based on with reasonable certainty, so that the adverse party may be able to prepare to resist such motion at the hearing thereof¹ It is the usual practice to add to the designation of the time in the notice the following words : "or as soon thereafter as I can be heard." The effect of such words is to continue the hearing of the application, when causes not within the control of the moving party, and of which the adverse party is equally bound to take notice, intervene between the time of giving the notice and the time appointed for the hearing, which prevent a hearing at the appointed time. Such causes are the adjournment of the court to a future day, an adjournment for the term, and similar causes. In such cases an adjournment of the court will continue the motion on the hearing docket, and no new notice of the motion will be required before it can be presented to the court for its action.

¹ Freeborn v. Glazier, 10 Cal. 337; Allen v. Beekman, 42 Wis. 185; Eaton v. Supervisors, 42 Wis. 317.

If the application is to be heard during the term of the court, and the parties or their attorneys reside in the same county in which the court is sitting, the Code requires that a notice of a motion shall be given at least twenty-four hours before the time appointed for the hearing of the motion.

As the notice is required to be actually served on the party or his attorney, the residence is held to be the place where the party served is at the time of service.

Rule 29, both of the Supreme Court and of the Court of Appeals, require written notice of all motions to be given at least twenty-four hours before the time set for hearing, unless such time is waived, or the adverse party has not entered an appearance in the court of review. But this requirement is on the assumption, as is usually the case, that the attorneys reside in Denver or its immediate vicinity.

But if the attorneys conducting the case are residents of other counties, we apprehend the Code rule of three days will apply, with the addition of one additional day for each twenty-five miles between the place where the notice is deposited in the post-office and the place, where the party¹ or attorney to whom the notice is addressed resides. There have been no published rulings on this point in Colorado

¹ Code, § 373.

MOTION.—WHEN TO BE SUPPORTED BY AFFIDAVIT.

SEC. 187. When the facts upon which the motion is founded appear in the record in the court of review and are ascertainable by a mere inspection of such record, as the record imports verity and cannot be contradicted by any matter *dehors* the record, an affidavit in support of such motion is not necessary. But, if proof of facts set out in the motion, not found in the record, be necessary to support the motion, such proof is made by an affidavit. This affidavit should be filed with the motion and a copy thereof be served with the notice of the motion.

Thus when a motion is made to dismiss a writ of error, because it has been sued out after the time limited by the statute, as the transcript of the record will show when the trial court, by which the judgment was rendered, adjourned for the term, the court of review will be governed wholly by the statement of the transcript, and no affidavit will be required. But if it be alleged that the transcript makes an incorrect statement of the facts, an affidavit is proper to support a motion for an additional or corrected transcript, which must be applied for to the clerk of or to the trial court, the court of review having no power to amend the transcript of the trial court. So, if it be alleged that the party who sues out the writ of error is within the exceptions of the statute of limitations, and for that reason that the writ has been sued out

in proper time, such fact must be established by affidavit.

If the motion be for permission to make new parties to a writ of error, an affidavit showing who the parties are; that they are within the jurisdiction; and that they are either necessary or proper parties thereto, because the judgment of the trial court will affect their substantial rights, will be required. An experienced practitioner will easily learn when an affidavit in support of his motion is necessary.

The affidavit must state in what State and county it was made. This is necessary to show where the oath was administered, and that the officer who administered the oath was acting within his territorial jurisdiction. If sworn to out of his jurisdiction, the oath is a nullity.¹ If administered by an officer within the State of Colorado, the court takes judicial notice of the territorial limits within which he is empowered to act. If no venue is given in the affidavit the court may refuse to consider it, but the usual practice is to permit it to be amended in this respect, if the omission to state the venue be occasioned by inadvertence.

The affidavit may be sworn to before any officer, who is by law empowered to take affidavits and administer oaths, and if the oath have been administered outside of the State, no certificate of authority to administer such oath will usually be re-

¹ Van Deusen v. People, 78 Ill. 645; Smith v. Richardson, 1 Utah, 194; Anderson v. Sloan, 1 Colo. 83.

quired, if the officer have an official seal. But the affidavit must not be sworn to before the attorney of the party, even though such attorney be duly empowered to administer oaths.¹

OF ENTITLING THE AFFIDAVIT.

SEC. 188. The Code provides that an affidavit without the title of the action or proceeding in which it is made, that is, without giving the names of the parties to the action or the court in which such action is pending, shall be as effectual for any purpose as if it were duly entitled, if it intelligibly refer to such action or proceeding.

The rule of practice is that if the affidavit be intended for procuring a writ, such as a *certiorari* or other similar writ, for which a verified application must be made to a court or a judge, before the suit is commenced, no entitling of the affidavit is permissible, as no action or proceeding is at that time pending in any court. At common law the entitling of an affidavit in such case would be fatal to it. But it is otherwise under the Code. But if an action or proceeding have been already instituted in the court the affidavit should be entitled, that is, should give the names of the parties to the action and the court in which such action is then pending.²

Thus when an application is made to the Supreme Court for an allowance of one of the writs it is au-

¹ Anderson v. Sloan, 1 Colo., 83.

² Code, § 383.

thorized to issue in the exercise of its original jurisdiction, the verified petition is not to be entitled. But when the particular writ is applied for in aid of its appellate jurisdiction, the verified petition is properly entitled in that action, in aid of which the particular writ is asked.

The affidavit must also be in the English language. This is a requirement of the Code. All proceedings in the courts of this State are conducted in the English language, because that is the language of the people. The judges of the courts, to whom the affidavits must be submitted for perusal and consideration, are not presumed to have knowledge of any other language than the English language. Hence, if the affidavit be in a foreign language, the court may refuse to consider it. This is, however, discretionary with the court. The better practice, however, is to accompany the affidavit, couched in a foreign language, with a sworn translation of the same into English.

The jurat of the affidavit must state the day, month and year, on which the oath to the affidavit was administered. The omission of the words "before me" in the jurat has been held to be a fatal defect.

A jurat which does not give the official designation of the officer who administered the oath to the affidavit is defective on its face.¹

¹ Code, § 411; *Dunton v. Montoya*, 1 Colo. 99; *Trinidad v. Simpson*, 5 Colo. 69; *Spencer v. Doane*, 23 Cal. 420; *Reg. v. Bloxham*, 6 C. B. 528; *Knight v. Elliot*, 22 Minn. 551.

NOTICE OF MOTION.

SEC. 189. Under the Code, as well as under rule 29 of the courts of review, when a party to an action or proceeding pending in any court of record desires to apply for an order in such action to the court or a judge thereof, he must first serve on the adverse party, if such party have appeared in the action, or his attorney of record in that action, a written notice, as hereinbefore stated (sec. 186). Except in case of an application for a preliminary injunction in a trial court, the provisions of section 148 of the Code, and in the Supreme Court in cases of an application for original writs, an application for an order in a cause, not necessarily preliminary to the institution of the action or proceeding, will not be entertained by the court or judge until due and legal service of notice of intention to apply for such order has been made upon the party adversely interested, or his attorney of record, nor until the court has obtained jurisdiction of such adverse party, by due service of process on him.

The only exception to this rule is when the adverse party is a non-resident of the State, is absent from the State at that time, and has no attorney resident or present in the State for the purpose of that action, or when the adverse party, residing in the State, has entered no appearance to that action.¹

¹ Code, § 372; Shotwell v. Rowell, 30 Ga. 557.

Section 373 of the Code abrogates the common-law practice as to motions, whereby an attorney in an action or proceeding was required to take notice of all written motions filed in the action during the term, by the adverse party, and was not entitled to any notice of the filing thereof. The common-law rule is, however, in force in criminal cases, as the Code does not apply to such cases.

Presence of counsel in the court-room, at the time of the calling of the attention of the court to the motion, by the moving party, is not sufficient to waive the service of the notice, nor is an informal verbal notice, while in conversation with opposing counsel, deemed a sufficient waiver of the written notice.¹

But if the counsel, when present, contests the allowance of the motion on its merits, and does not confine his objection to the want of a written notice of the application, or to the insufficiency of the notice, if any were given, this will be held a waiver of the written notice.²

In all cases in which the party has an attorney, who has appeared for him in the action or proceeding, the service of all papers in the action shall be either upon the attorney or upon the party himself. And the Code further provides that after a defendant has appeared in the action, he or his attorney

¹ B. R. & A. Co. v. Bowles, 24 Cal. 354.

² Brown v. State, 8 Heisk. 871.

shall be entitled to notice of all subsequent proceedings, of which notice is required to be given.¹

The word "party" means one of the opposing litigants. But where there are several plaintiffs or several defendants the word "party" embraces all the individuals on each side of the case, whether plaintiffs or defendants.²

The word "attorney" includes an attorney at law, and every person who is authorized to appear in a court of record to represent one of the parties to an action or proceeding at any stage thereof.³

NOTICE — HOW TO BE SERVED.

SEC. 190. The service of the notice may be either personal or by mail. Personal service is made by delivering it to the attorney himself. In such case the place of service is not material, provided the notice is placed in the hands of the attorney. The Code provides that service may be made on the party, or on the attorney, at the election of the person giving the notice.⁴

It will sometimes happen that a party will refuse to receive a notice when offered to him. In such case the courts hold that if a person, on whom it is sought to serve a notice, decline to receive it from the hands of the person seeking to serve it, when it

¹ Code, §§ 370-379.

² *Hobbs v. Davis*, 56 N. H. 74; *Rupp v. Swineford*, 40 Wis. 28.

³ Code, § 442.

⁴ *Nathan v. Sutphen*, 63 Cal. 267.

is decorously offered to him, he being informed of the character of the paper offered, the person serving it may deposit it in any convenient place, in presence of such party, and notify him of that fact. Such offer, refusal to accept and the depositing of the papers for him and in his presence, is held to be due and legal service of such paper.¹ Thus in Wisconsin, where a notice was offered to the attorney by a competent person, in the attorney's office, and the attorney refused to receive it, leaving it on a table in the office, in front of which the attorney was standing, was held to be sufficient service.

The principle on which such rulings are made is that a person will not be permitted to take advantage from his own wilful wrongful act.² But in all such cases the person attempting to serve the notice should state what the paper is, that the person served may act advisedly. This is prescribed by the Code in case of serving a summons.

SERVICE ON ATTORNEY'S CLERK.

The Code further provides that the service of a notice of a motion may be made on the attorney at his office: First, by leaving it therein with his clerk, if he be absent from his office at the time of service; or, Secondly, by leaving it therein with a person who

¹ Norton v. Maeder, 4 Sawy. 619.

² Smith's Sheriffs and Coroners, 196; Slaght v. Robbins, 13 N. J. Law, 340.

"When there is no person in the attorney's office, service may be made by leaving the notice in a conspicuous place in the office, between the hours of eight in the morning and six in the evening."

A certificate of service which states that "there was no one in the front room of the attorney's office" is not sufficient, for it implies that the attorney occupied two or more rooms, and might have been at the time in one of the other rooms. If this were the fact, the notice ought to have been served on him or on his clerk, etc., if he were absent, and the clerk were in one of the rooms of the office. But the deposit of the copy notice in a letter-box attached to the door of the attorney's office in which he was accustomed to receive his letters and mail, was held to be a deposit in a conspicuous place in his office. Usually the deposit should be upon his table or desk at which he sits when in the office, and in front of his seat, with his name indorsed on the copy so as to attract his attention to it when he comes in.

When service is made in this manner, which is not infrequent, the affidavit of service must set out fully the probative facts from which the court, in the exercise of its judicial functions, may determine whether the place where the notice was left was "a conspicuous place in the office."¹

¹ Code, § 376; *Gelston v. Swartout*, 1 Johns. Cas. 137; *Anon.*, 18 Wend. 578; *Jackson v. Gardner*, 3 Caines, 95; *Doll v. Smith*, 32 Cal. 43; *Elder v. Trevert*, 18 Nev. 446; *January v. Superior Court*, 73 Cal. 537.

WHERE ATTORNEY'S OFFICE IS NOT OPEN.

Where the attorney's office is not open, so as to admit of service therein, then service may be made by leaving it at the attorney's residence with some member of his family over the age of fifteen years.

The courts invariably hold that when the attorney's office is locked so that access cannot be had to it, the service is to be made in some one of the other modes pointed out by the statute. Hence unlocking the door, without the permission of the attorney, or throwing the copy through the open transom over the door of the attorney's office, have been held not valid service.

The service in this case is governed by the same rules that govern the service of a summons by leaving a copy at "the usual place of abode of the defendant." See Fitnam's Code Summons, "Usual Place of Abode."¹

WHERE ATTORNEY'S RESIDENCE IS NOT KNOWN.

If the attorney's residence be not known to the party who gives the notice, then service may be made by putting the notice in the post-office, postage prepaid, directed to such attorney.

This provision of the Code does not apply to the case of attorneys who reside at different places,

¹ Code, § 376; Lathrop v. Judevins, 2 Cow. 484; Ashiel v. Degraw, 6 Cow. 63; Corning v. Pray, 2 Wend. 626; Anon., 18 Wend. 578.

between which there is regular communication by mail, for which see *post*, "SERVICE BY MAIL."

It applies to the case only of attorneys who have no known office or place of doing business, but who dwell in the same city or town, whose dwelling-place is unknown to the person who gives the notice. In such case the attorney will usually receive mail daily at the post-office, and the Code provides for service by a deposit of the notice in the post-office, as the most likely mode of reaching him. In cities which have a mail-carrier service there is in the post-office usually an official known as a "directory clerk," who keeps a list of persons whose names are not found in the street directory, and of the place whereat mail for them is to be delivered. A letter incorrectly addressed to a person within the delivery of such office will, in the usual course of business, be placed in his hands to be correctly addressed and thus reach the person for whom it is intended in the course of delivery by the carrier.

To justify service in this mode, service in any other mode prescribed by the Code, in the preceding parts of this section, must be impracticable. It is only when personal service, or service at the office, or at the residence, is impracticable, that service through the post-office is permissible. Hence the affidavit of service must negative the practicability of service in all of the other modes prescribed, and must affirmatively show want of knowledge of the attorney's resi-

dence, with due inquiry in the proper quarters for such residence.

Deposit in a United States mail street letter-box, or delivery to a United States letter-carrier, on his route, is held to be equivalent to putting it in the post-office proper.²

The affidavit of service should also affirmatively show that the postage was prepaid on the envelope that contained the notice. In the absence of such statement it will be fairly implied that the letter was not postpaid.³

When so deposited the courts hold that the letter is at the risk of the person to whom it is addressed, it being presumed that it is delivered in due course of the mail and received by the party to whom it is addressed. Such deposit is *prima facie* evidence of its receipt by him.

SERVICE ON A PARTY TO THE ACTION.

Unlike the Codes of other States, the Colorado Code permits the service of notices of motion and other papers in an action or proceeding to be made on a party. Service of the notice, if made on a party to the action or proceeding, may be made by leaving such notice or other paper at his residence between the hours of eight in the morning and six in the evening, with some member of his family over the

¹ Code, § 376; Abb. Tr. Ev. 433, 434; Bank v. De Groot, 7 Hun (N. Y.), 210; Pearce v. Langfit, 101 Penn. St. 507; Burns v. Bank, 12 Colo. 539; Morton v. Morton, 16 Colo. 358.

age of fifteen years ; or, if his residence be not known, by putting the same inclosed in an envelope into the post-office, postage prepaid, directed to such party.¹

Service on a party is governed by the same rules as are hereinbefore given for service on his attorney. Such service may be either "personal," by giving it to him in person, or "by leaving it at his residence," if it be known, or "by depositing it in the post-office," if it be not known. See *ante*, "Where attorney's residence is not known."

Semble. Where the notice is to be made on a corporation, party to the action, service cannot be given under the first part of this provision, but it may be given by depositing the notice in the post-office.

SERVICE BY "MAIL"—WHEN AUTHORIZED.

Service of a notice and motion may be made "by mail," when the person giving the notice, and the person to whom it is desired to give the notice, reside at different places between which there is regular communication by "mail."

"Mail," means the delivery and carriage of letters by public authority through public post-offices. In the United States it has reference to the United States post-offices, operated under the control of the Federal government, and does not include private post-offices by whomsoever conducted. The word

¹ Code, § 376.

“mailed,” when applied to a letter, means that such letter has been properly prepared for transmission through the Federal post-office, by being fully prepaid, and placed in the custody of some servant of the postal department, who is charged with the duty of forwarding the mail to its proper destination, for the purpose of being sent through the mail to the address written on the back of such letter.

The “person” making the service of the notice is the attorney or party who gives the notice, not the person who delivers it.

Service of a notice “by mail” is valid service only, except as hereinbefore stated where the attorney’s or party’s residence is unknown, when the attorney or party who gives the notice resides in a place, town or city, different from that at which the person to whom the notice is to be given resides. It is also essential that there be regular communication by mail between the two places; that is, that there is an established postal route, a stated arrival and departure of the mails, and a regular post-office, established under Federal authority.¹

SERVICE BY MAIL—DISTANCE—TIME.

SEC. 192. In case of a service through the United States post-office, the notice or other paper must be inclosed in an envelope; be properly and correctly

¹ Renshaw v. Triplett, 23 Mo. 220; Sanderson v. Renstedler, 31 Mo. 485; Moore v. Beese, 35 Cal. 186; People v. A. D. T. Co., 30 Cal. 186; Code, § 377.

addressed to the person for whom it is intended by his correct name; must give his correct post-office address; must be a known United States post-office; and all the postage which is legally payable on such letter must be prepaid thereon by United States postal stamps. The name of the sender and his residence or office should be indorsed on such envelope, but he should be careful not to use the envelope known as a return envelope, requesting its return in a specified number of days.

The reason of this is, that the rules of the post-office department require that all uncalled-for letters in a post-office, at the expiration of thirty days from the day on which they have been received at the office, shall be returned to the sender, if his address is found on the envelope, otherwise such letters are sent to the dead letter office at Washington, D. C. If a request for the return of the letter in a less number of days be upon the envelope, such request would insure a return of the letter at the time requested, and the addressee may by that means be prevented from receiving the letter which he might receive if the letter remained the thirty days allowed by the rule. Due diligence will require the letter to remain for the thirty days, if not sooner delivered to the addressee.

The time within which an act is to be done, as provided by the Code, is computed by excluding the first day, that is, the day on which the letter is

mailed, and including the last day of the time specified. But if the last day be a Sunday, or a legal holiday, the next day, if not a legal holiday, shall be the last day of the time specified.

The requirement that the last day be not counted, if it be a Sunday or legal holiday, applies only when some act is to be done on such day. And when a Sunday follows a holiday, or a holiday, a Sunday both days are to be excluded in the count of the number of days. And when the act is required to be performed within a certain time, such time is computed by entire days. Parts or fractions of days are not usually taken into consideration.

In the case of a service of a notice or other paper by "mail," the Code prescribes that the time of the service must be increased one day for each twenty-five miles of distance between the post-office in which the letter is deposited for its transmittal to the addressee, and the post-office at which it is to be delivered to him. This means that if under the Code three days' notice is prescribed, and the post-office at which the addressee receives such letter is distant one hundred miles from the post-office in which it is mailed, service of the notice will be complete only after the expiration of seven days. But this additional time can be extended no more than forty days.¹

¹ Code, § 378; Robinson v. Foster, 12 Iowa, 186; Mills' Ann. Stat., § 2127; Cornell v. Moulton, 3 Denio (N. Y.), 15; Columbia T. Road, 10 Wend. (N. Y.) 423; Stebbins v. Anthony, 5 Colo. 348; Evans v. Bowers, 13 Colo. 511, and authorities cited.

PRESUMPTION FROM A PROPER MAILING OF NOTICE.

SEC. 193. The rule is well settled, that if a letter, which is correctly addressed and properly prepaid by stamps, is shown to have been deposited in the post-office, or in a letter-box provided for that purpose by the postal authorities, or given to a letter carrier on his route, for the purpose of being mailed, from the known course of business in the postal service, it will be presumed that such letter reached its destination within the regular time required for its transportation, and was delivered to the person to whom it was addressed. This presumption, which is only *prima facie*, and is subject to rebuttal, is founded on the presumption that the post-office officials, who are sworn officers, have performed the duties required of them by the postal laws and regulations. Proof that the party received the notice is not required. All that is necessary is to show that the person resided at the place to which the letter was addressed ; that the envelope was correctly addressed to such place and to him by his correct name ; that all the postage required to be paid thereon was prepaid by stamps, and that such prepaid letter was deposited in a Federal post-office, or in a United States letter-box, or delivered to a United States letter-carrier to be mailed.

When such proof is made, it will then rest on the other party to show its non-receipt by him. So, if

the addressee have changed his place of residence, and has given due notice of the change of his post-office address to the postmaster of the former place of residence, with a request to forward his mail to such new address, as the postal laws provide for a compliance with such request, the same presumption as to receipt of the letter arises.¹

Until due proof of its non-receipt by him, the court will act on these presumptions and proceed to hear and determine the motion and grant or deny the order applied for, in the same manner as if he received the notice, and neglected to appear in answer to it.

PROOF OF SERVICE OF NOTICE.

SEC. 194. Proof of service of the notice may be made by the affidavit of the person who serves it. This affidavit must show affirmatively that every requirement of the statute prescribing the mode of service in that case has been strictly complied with. Nothing necessary to show a due service ought to be omitted. In serving a notice by leaving it at the attorney's office, it should show the absence of the attorney at that time, and that it was left with some person then in charge of his office, or in a "conspicuous place in the office." Merely stating that he left

¹ Callan v. Gaylord, 3 Watts (Pa.), 321; Tanner v. Hughes, 53 Penn. St. 289; Howard v. Daly, 61 N. Y. 362; Huntley v. Whittier, 105 Mass. 392; Gaffney v. Bigelow, 3 Abb. N. C. 311; Renshaw v. Triplett, 23 Mo. 220; Sanderson v. Renstedler, 31 Mo. 485; 2 Whart. Ev. 1328; 1 Greenl. (12th ed.) 40, 573a.

a true copy at the office for the attorney is not sufficient.

So, where the service is by mail the affidavit must state: First, that the attorneys reside at different places, between which there is regular communication by mail; and Secondly, the facts of depositing the notice in the post-office in an envelope, on which all postage legally chargeable was prepaid by stamps.¹

FORMS OF PROOFS OF SERVICE.

SEC. 195. Where the notice is given to the attorney or party in person an acceptance or admission of due service in writing may frequently be obtained of him. This acceptance or admission should be written at the foot of the notice and be signed by the party or attorney. It may be in the following form:

I admit due and legal service of the above notice and papers thereto attached, this — day of —, 18—.

_____,
Attorney for _____.

Or

Received a copy of the above notice and accompanying papers this — day of —, 18—.

_____,
Attorney for _____.

An admission of due service is an admission that the full time for giving the notice prescribed by

¹ Callado v. A. P. T. Co., 49 Cal. 511; Doll v. Smith, 32 Cal. 475.

statute has been given. But when the word "due" is omitted, the admission does not waive any irregularities as to time, but merely admits the service in the proper manner. The genuineness of the attorney's signature will be presumed until the contrary is shown by affidavit.

Where the service is merely irregular, the courts will usually require an affidavit that the notice was not actually received by the objecting party.¹

The second form above is the better one, since it merely acknowledges the receipt of the papers and leaves open every other question, if the attorney desire to raise any, as to sufficiency of notice or of the service.

AFFIDAVIT OF PERSONAL SERVICE.

STATE OF COLORADO, }
County of ——. }

A. B., being duly sworn, on his oath, says, that he did, on the — day of —, 18—, at the county and State above named, personally deliver to C. D., the person in said notice named, a true copy of the annexed notice and of the papers thereto attached.

(*Jurat.*)

(*Signature.*)

IF LEFT AT OFFICE.

After the words, "county and State above named," "personally deliver to C. D., clerk of the person named in such notice, then in his office, said attorney being absent therefrom, a true copy," etc.; or "to a person then in charge of his office."

¹Tallman v. Barnes, 12 Wend. (N. Y.) 228; Eames v. Sitt, 2 Hill (N. Y.), 363; Ripley v. Burgess, 2 Hill (N. Y.), 361.

IF NO ONE IN THE OFFICE.

Did personally leave on the table in the office of C. D. named therein, at which he usually sits, that being a conspicuous place therein, no one being at that time in said office, a true copy, etc.

SERVICE BY MAIL.

(*Venue.*)

A. B., being duly sworn, on his oath, says, that F., who is attorney for the plaintiff in the action in which this notice is served, resides at (—) in the county of — ; Second, that G., who appears as attorney of record for —, resides at — in the county of — ; Third, that there is regular communication between said places by United States mail ; Fourth, that affiant, by the direction of said F., did on the — day of —, 18—, deposit in the United States post-office at — a true copy of the notice hereto attached, with the accompanying papers inclosed in an envelope securely sealed, addressed to (here give address as on envelope) and that all postage on said envelope was thereon duly prepaid by stamps.

(*Jurat.*)

(*Signature.*)

The motion, notice and affidavit should be filed in the clerk's office, with the papers in the action.

HEARING OF MOTION.

SEC. 196. Before the motion is called for a hearing on its merits all objections to the manner of the service of the notice or to its sufficiency should be called to the attention of the court, as otherwise such objections will be waived, if the party served appear and make no objection to the service or to the notice. The moving party cannot safely proceed until the

notice has been duly served the time prescribed by the statute.

In the courts of review, the usual practice being to have a resident attorney at the seat of government to attend to the case, it will be only on rare occasions that service of notice by mail will be required. But if the attorneys of the parties are residents of other counties than Arapahoe, service of notice by mail will be required, and it seems that the Code provisions in relation thereto apply, especially as the Supreme Court has promulgated no other rules in relation thereto.

At the time mentioned in the notice if the court be sitting, or at the next sitting thereafter, the mover of the motion calls the attention of the court to the motion, and if the other party be present and do not for any sufficient cause require a postponement of the hearing, the motion is heard by the court. Usually no briefs are to be filed on the motion, but there are sometimes cases of such a character as that the court will ask the parties to prepare and file briefs in support of their respective views on the point in controversy. The party moving should read his written motion, as the same has been filed with the clerk, to save a misunderstanding of its object by the court. The affidavits may also be read, though in most cases the affidavits are looked into by the court, when considering the motion in consultation of the judges, and are not usually read in open

court. There are cases of minor importance, in which the court denies the application without consultation in chambers, either because the application is not made in proper time or on tenable grounds, or grants it because it is properly grantable.

In the trial courts, if the motion is granted or denied, the party aggrieved may except to the decision of the court and tender a bill of exceptions. In such case he should incorporate into such bill the motion and all affidavits in support thereof. But in the courts of review no exception will lie, as there is no review of the action of the court, except on a motion for a "rehearing."

CHAPTER XIII.

Admission of Attorneys.

- SEC. 197. License from Supreme Court.
 198. Qualifications to obtain license.
 199. Additional requirement by the Supreme Court.
 200. Standing committee for each district.
 201. Oath, form of.
 202. Roll of attorneys, what to state.
 203. Attorneys from other States, how admitted.
 204. Striking name from the roll.
 205. Procedure under foregoing provisions.
 206. Effect of disbarment.
 207. Readmission of disbarred attorney.

LICENSE FROM SUPREME COURT NECESSARY.

SEC. 197. No person shall be permitted to practice as an attorney or counselor-at-law, * * * in any court of record within this State * * * without having previously obtained a license for that purpose from two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counselor-at-law, etc.

QUALIFICATIONS TO OBTAIN LICENSE.

SEC. 198. No person shall be entitled to receive a license as aforesaid until he shall have obtained a certificate from the court of some county of his good

moral character. Also a certificate from one or more reputable counselors-at-law that he has been engaged in the study of law for two successive years prior to the making of such application.

The certificate of good moral character is usually procured from a County or District Court, sitting in the county, in which the applicant resides, and is made in open court, on an application of an attorney or other person to the court for such certificate; and his statement that the applicant is of good moral character. In some States a prior notification of intention to apply to the court for such certificate is required by law or rule of court to be published in a public newspaper of applicant's residence for a period of three or more weeks, but such rule does not exist in Colorado.

The certificate is issued by the court, under the hand of its clerk and the seal of the court, and delivered to the applicant.

The certificate of two years' study is in many cases a mere matter of form, as the statute does not require specifically that the applicant have studied in the office of the attorney who gives the certificate.

ADDITIONAL REQUIREMENT PRESCRIBED BY SUPREME COURT.

SEC. 199. By rule 49 of the Supreme Court an additional qualification to those prescribed by statute

is required of each applicant for license to practice as an attorney in Colorado. It is :

“ No person shall be admitted to practice law in this State who shall not have taken and subscribed an oath that he is a citizen of this State ; also that he will commence the practice of law therein within three months from the date thereof and make the same his permanent and usual occupation.”

This rule has been adopted chiefly as an earnest of the sincerity of the person applying for a license, and to prevent the granting of licenses to parties from other States, who seek the license from the Supreme Court of Colorado for the sole purpose of asking admission to the bar of the State, of which they are actual residents, upon the basis of the license obtained in Colorado.

Rule 49 further prescribes that no person shall be admitted to practice in this State, unless he further takes an oath that he has never been disbarred by any court of record in which he has heretofore practiced and has never been convicted of a felony. This provision was adopted on February 14, 1890, to stop the applications of attorneys from other States, who have been disbarred in their States, or who have been convicted of felony therein, and who have removed to the State of Colorado for the purpose of practicing as attorneys therein.

STANDING COMMITTEE FOR EACH JUDICIAL DISTRICT.

SEC. 200. It shall be the duty of the Supreme Court to appoint a standing committee of three attorneys-at-law for each judicial district of this State, whose duty it shall be to examine all applicants for license as aforesaid; and if, upon such examination, a majority of such committee shall deem the applicant qualified to practice as an attorney and counselor-at-law in the courts of this State, they shall sign a certificate to that effect and transmit the same to the clerk of the Supreme Court.¹

No fee is prescribed by law to be paid the examining committee, and its labor in conducting this examination is wholly gratuitous. In the case of *People v. Betts*, the Supreme Court for the first time was called upon to construe the foregoing section. In that case it held: First. That the applicant for admission must apply to the committee of his own judicial district, and that it is not permissible for him to apply to the committee of any other district. If he believes that a majority of the members of the committee of his district are hostile to him and will not treat him fairly upon an examination, or give him a fair report of qualification to admission, he must apply to the Supreme Court for the proper remedy. This it will give in cases requiring it, by the appointment of a special committee for his examination, or

¹ 3 Mills' Stat., §§ 196, 197, 198.

by directing his examination by the committee of some adjacent district.

Second. That a second application, after rejection by the committee of his district, to a committee of another district is not permissible, except on application to the court.

Third. That an examination by an individual committeeman is not a compliance with the statute. Two at least of the committee should be present and conduct the examination. The acceptance and indorsement of the examination, conducted by one only, by the other committeemen is not sufficient.¹

OATH — FORM OF.

SEC. 201. The following oath of office shall be administered to every attorney and counselor-at-law before they subscribe the respective rolls, to-wit :

“ I swear (or affirm) that I will in all things faithfully execute the duties of an attorney and counselor-at-law, according to the best of my understanding and abilities.”¹

The foregoing oath may be taken before any officer, who is by law authorized to administer oaths in the State of Colorado, and is usually found on the face of the license. After the oath has been taken and subscribed and properly authenticated by the officer who administered it, the license is then returned to the clerk of the Supreme Court for a cer-

¹ The People, *ex rei*. Betts, 7 Colo. 453.

tificate of enrollment, under the provisions of section 72 of General Statutes.

ROLL OF ATTORNEYS—WHAT TO STATE.

SEC. 202. It shall be the duty of the clerk of the Supreme Court to make and keep a *roll* or record, stating at the head or commencement thereof that the persons whose names are therein written have been regularly licensed and admitted to practice as attorneys and counselors-at-law within this State, and that they have duly taken the oath to support the Constitution of the United States and the Constitution of this State, and also the oath of office, as prescribed by law, which shall be certified and indorsed on said license.

And no person whose name is not subscribed to or written on such roll, with the day and year when the same was subscribed thereto, or written thereon, shall be suffered or admitted to practice as an attorney or counselor-at-law within this State, etc.¹

ATTORNEYS WHO HAVE BEEN ADMITTED TO PRACTICE BY THE COURTS OF OTHER STATES—HOW ADMITTED.

SEC. 203. Any person producing a license from any court of record, or a duly authenticated copy of the record of any court of record of the United States, showing that he has been regularly admitted

¹ Mills' Ann. Stat., §§ 199, 200.

an attorney-at-law in any court of record in the United States; and it appearing to the satisfaction of the judges of the Supreme Court, or of a majority of them, that he is a man of good moral character, he shall be licensed and admitted to practice in all the courts of the State without examination. Persons producing such evidence of their admission as attorneys-at-law in other States or Territories may make application to the judges of the Supreme Court in vacation, and two or more of said judges shall issue a license to such person in the same manner as if such application was made to the Supreme Court.

In addition to the foregoing statute, the Supreme Court has adopted the following rule:

“No person shall be admitted to practice as an attorney and counselor-at-law upon evidence that he has been admitted to the bar of another State or Territory, if at the time of his admission to the bar of such State or Territory he was a citizen of this State.”¹

Hence to be admitted to practice in courts of record of this State it is required:

FIRST. That the applicant be a person of good moral character, and that he produce to the Supreme Court a properly authenticated certificate thereof from some court of record within this State.

SECOND. That he have studied for at least two years, and produce to the Supreme Court the certifi-

¹ Mills' Ann. Stat., § 206. Rule Supreme Ct. 48.

cate of one or more reputable counselors-at-law of this State, to that effect.

THIRD. If a resident of this State, and he have not previously been admitted in some other State or Territory, that he have passed a successful examination by the standing committee of the judicial district of this State in which he resides.

FOURTH. That he have taken an oath to support the Constitution of the United States and of the State of Colorado; the oath of office prescribed by General Statutes, section 78, and the oath required by the rules of the Supreme Court.

FIFTH. That the oath of office be taken before and be certified by some person duly authorized to administer oaths in this State, and that it be indorsed on the certificate of license.

SIXTH. That the attorney's name has been enrolled on the attorney's roll.

Until each and every one of these things are done the applicant is not permitted to practice in a court of record of this State, and is not technically an attorney-at-law.

If he have been admitted to practice by a court of record of another State, the examination by the standing committee of his district is dispensed with, but he must swear that he has never been disbarred, and never convicted of a felony, and if he were a citizen of this State at the time of his admission in another State, the license there granted will not en-

title him to admission in this State, except on the conditions that apply to residents of this State.

POWER OF SUPREME COURT TO STRIKE NAME OF
ATTORNEY FROM THE ROLL.

SEC 204. The justices of the Supreme Court in open court shall have power, at their discretion, to strike the name of any attorney or counselor-at-law from the roll for misconduct in his office.¹

In the case of *People, ex rel. v. Green*, an attorney, against whom proceedings for disbarment were instituted, the Supreme Court comments upon the above statute and says :

“The statute not only vests this court with a discretion which may be exercised, but by implication it enjoins a solemn duty upon the court, which *must* be exercised in a proper case,” and quotes the words of Chief Justice Marshall, in *Ex parte Burr*, 9 Wheaton, page 529 : “This discretion ought to be exercised with great moderation and judgment, but it must be exercised.”

In a subsequent case against the same defendant, whose name had been at a period subsequent to the first decision restored to the rolls, the court cites the following and adopts it in its opinion :

“An attorney is liable to be removed from office by the court for sufficient reason and on proper show-

¹ Mills' Stat., § 200.

ing. This reason and this showing are not necessarily limited to criminal offenses, or to an act which would create a civil liability. In the case of an attorney of this court, he may be removed from his office of attorney absolutely or for a limited period of time, or in the common phrase, may be suspended or disbarred for any matter or thing proved against him which shows that he is unfit to be permitted to practice in the court as one of its officers."

This unfitness may be shown by his guilt of a crime, as theft, murder, burglary. It may also be shown by proof of such bad moral character as is inconsistent with such an honorable office. It may be shown by specific acts done in connection with his business in the court or out of it, if it be in the practice of the duties of an attorney, which may show him unfit to be trusted as such, but which are short of any criminal offense.¹

The statute further provides :

"In all cases where an attorney of any court of this State, or solicitor in chancery, shall have received, or may hereafter receive, in his said office of attorney or solicitor, in the course of collection or settlement of any claim left with him for collection or settlement, any money or other property belonging to any client, and shall, upon demand made and a tender of his fees and reasonable expenses, refuse

¹ People, *ex rel.* v. Green, 7 Colo. 237; People, *ex rel.* v. Green, 9 Colo. 506.

or neglect to pay over or deliver the same to the said client, or to any person duly authorized to receive the same, it shall be lawful for any person interested, to apply to the Supreme Court of this State for a rule upon the said attorney or solicitor to show cause at a time to be fixed by said court, why the name of said attorney or solicitor should not be stricken from the roll, a copy of which rule shall be duly served upon said attorney or solicitor at least ten days previous to the day upon which said rule shall be made returnable; and if, upon the return of said rule, it shall be made to appear to said court that such attorney has improperly neglected or refused to pay over or deliver said property or money so demanded as aforesaid, it shall be the duty of said court to direct that the name of such attorney or solicitor be stricken from the roll of attorneys in said court."

PROCEDURE UNDER THE FOREGOING PROVISIONS.

SEC. 205. Every attorney, before his name is stricken off the roll, shall receive a written notice from the clerk of the Supreme Court, distinctly stating the grounds of complaint or the charges exhibited against him, and he shall, after such notice, be heard in his defense and allowed reasonable time to collect and prepare testimony for his justification.¹

The procedure as followed in the Green case first above cited, was by a petition addressed to the Su-

¹ Mills' Ann. Stat., § 201.

preme Court, reciting the facts upon which the charge or charges of malconduct in office were based, in detail and fully, and praying an investigation of the same by or under the direction of the court. This petition should be presented at an open session of the court. Upon the presentation of the petition, a rule is entered by the Supreme Court upon the accused attorney, requiring him to appear before the court on a day and at a time therein named, and show cause why his name should not be stricken from the roll for malconduct in his office as an attorney of the court.

The complaint should be verified by the affidavit of the party who makes it, and should state clearly, fully and as succinctly as possible to a fair statement, all the facts upon which the complainant relies.

If the complaint presents a *prima facie* case for the action of the court, and a rule to show cause is granted by the court, a copy of the complaint is usually furnished to the respondent, that he may either demur thereto, if he deem the complaint insufficient to disbar or suspend him from the practice, or answer, if the facts stated in the complaint may be denied by him under oath.

At the return day of the rule, if respondent raise an issue of law only, the demurrer may be then heard, or a day appointed for argument, and time given to prepare briefs. If an issue of fact is raised by the answer, the court will appoint a day for hear-

ing the testimony, or where the witnesses are residents of a distant part of the State, direct the testimony to be taken at the next ensuing term of the District Court, in which they reside. The respondent may appear at the taking of the testimony, in person and by attorney, and cross-examine the complainant's witnesses, and produce and examine witnesses in his own behalf. He is permitted to produce evidence not only in justification, but also in mitigation, since the court is authorized to act in a wise discretion, and is not bound by the strict letter of law in framing its judgment in the case.

After the evidence is heard by the court, or submitted to the court, when taken in a distant part of the State, time is given to submit briefs upon disputed questions of law, and oral argument may be heard, if asked in compliance with the rules of the court.

After a decision is given by the court a rehearing may be applied for as in other cases.

In the class of cases embraced in section 74 of General Statutes, the complaint should specifically show every fact necessary to establish the delinquency which that section is intended to punish.

In the case of *People v. Ryalls*, which was under that section, the court says:

"It has been evidently assumed in the present and several similar cases recently brought into this court, that the statute mentioned was framed to aid clients in

collecting moneys thus wrongfully withheld by their attorneys. But we do not conceive that the statute referred to was adopted for the purpose of affording an additional private remedy for the collection of the moneys mentioned. In our opinion, the principal object of the Legislature was to place in the hands of this court an additional power, whereby the profession may be purged of unworthy members and litigants be protected from impositions practiced by such persons."

Hence in that case, notwithstanding that respondent paid over the money wrongfully withheld, the court refused to permit the case to be dropped and disbarred the respondent.¹

It also appears that in that class of cases the Supreme Court will not permit the complaint to be withdrawn or discontinued on payment of the money alleged to have been wrongfully withheld, for the reason that a paying over does not relieve the delinquent attorney of the charge, and the making of such a charge may be used in some cases as a means of compelling the payment of an unjust and wrongful demand by him, as a lesser evil than incurring the expense, annoyance and trouble incident to the defense in the Supreme Court, even when he has a full and perfect defense to the claim.

¹ People, *ex rel.* v. Ryalls, 8 Colo. 332.

EFFECT OF DISBARMENT.

SEC. 206. Any attorney, whose name shall at any time be stricken from the roll, by order of the court in the manner aforesaid, shall be considered as though his name had never been writtten thereon.¹

Hence from the time that his name is stricken from the roll he is no longer permitted to practice as an attorney and counselor-at-law, or to commence, conduct or defend any action, in which he is not either a plaintiff or a defendant thereto, either by subscribing his own name, or that of any other licensed attorney or party to the action, in any court of record of the State of Colorado.

He also becomes liable to an action for the recovery of all moneys which shall have been paid to him for fees and services by him rendered as an attorney and counselor, while so disbarred, as for money had and received to the use of the person paying the same to him; and also to a *qui tam* action for three times the amount paid, at the suit of any person, etc., as provided in section 207 of Mills' Statutes.

But he is authorized to commence or defend any action in a court of record in which he is a *bona fide* plaintiff or defendant; but he must not become such for the purpose of evading the effect of his disbarment, by acquiring an interest in the cause of action for the purpose of bringing suit in his own name,

¹ Mills' Ann. Stat., § 202.

or defending it as a party thereto. This is the ruling of the District Court of Arapahoe county in a recent case.

ATTORNEY WHO HAS BEEN DISBARRED MAY APPLY
FOR READMISSION.

SEC. 207. The same section of the statute provides that the justices of the Supreme Court may, in open court, authorize an attorney who has been disbarred to again sign or subscribe the roll of attorneys. This is done on petition to the court, and is usually supported by the affidavits of attorneys and other persons in good standing that the delinquent attorney has so far repaired the wrong and delinquency, for which he was disbarred, that it seems proper to permit him to again sign the roll and resume the duties of an attorney in the courts of this State. The granting of this permission is, however, a matter of pure discretion on the part of the court and will be granted by it only when satisfied that the delinquency is not the result of moral turpitude, and does not show a want of moral fitness to practice at the bar of the courts. Where the party has been convicted of a grave violation of the Criminal Code, especially a felony, such as embezzlement, larceny, forgery and similar offenses, the court will rarely, if ever, permit a restoration to the roll of attorneys.

It has also in one case been held in Colorado that a pardon by the governor of the offense committed,

for which the disbarment was inflicted, will not have the effect of restoring the delinquent to practice, since the question of admission or of readmission to practice as an attorney is exclusively within the province of the judicial department of the State, with which, under the Constitution, the executive cannot in any manner interfere to control its discretion.

CHAPTER XIV.

Contested Elections.

- SEC. 208. Contests of election of judges.
209. Contest, how initiated.
210. Contents of statement.
211. Grounds for contesting election.
212. Statement continued.
213. Time of filing statement.
214. The petition contents.
215. Procedure after filing petition.

CONTESTS OF ELECTION OF JUDGES.

SEC. 208. Section 1656 of Mills' Annotated Statutes gives the Supreme Court original jurisdiction for the adjudication of contests of the election of any person to the office of supreme, district or county judge, and empowers it to prescribe rules for practice and proceedings in conducting such contests in said court. This act is, in pursuance of section 12 of article VII of the Constitution, which authorizes the General Assembly to designate, by general law, the courts and judges by whom the several classes of election contests, not in the Constitution provided for, shall be tried, and regulate the manner of trial and all matters incident thereto. The constitutionality of the section of the General Statutes,

above cited, has been affirmed in the case of *Allen v. Glynn*, a contest pending in the Supreme Court, involving the office of district judge of the thirteenth judicial district. In pursuance of the above-cited statute, the Supreme Court has adopted rules 39 to 46, inclusive, for the conduct of such contests therein.

CONTEST, HOW INITIATED.

SEC. 209. Section 39 is as follows :

“Any qualified elector, wishing to contest the election of any person to the office of supreme, district or county judge shall, within thirty days after the canvass by the State board of canvassers, in case of the supreme or district judge, and within twenty days after the canvass by the county board of canvassers, in the other case, file a written statement of his intention to contest, in the office of the secretary of State, in the case of the supreme or district judge ; and where the contest is for the office of county judge, in the office of the county clerk of the county, in which the person whose election to the office of county judge is to be contested resides ; which statement or motion shall set forth :

“First. The name of the contestor.

“Second. The name of the contestee.

“Third. The office.

“Fourth. The time of the election.

“Fifth. The particular cause of contest.

“The statement shall be verified by the affidavit of the contesting party, that the causes set forth are true, as he verily believes.”

To institute a contest the first requirement is that the contestor be a qualified elector. This is held to be an essential and traversable averment, which, if denied by contestee in his answer, must be established by proofs on the trial.¹

A qualified elector is one who, under the Constitution and laws of the State, is authorized to vote for that particular office at the election at which the person whose election is contested, claims to have been elected. To contest the election of supreme judge, he may be an elector of any county within the State. If the contest be of the election of a district judge, it seems that no one but an elector of that judicial district can initiate the contest, and in like manner no one but a qualified elector of the county can initiate a contest of the election of a county judge.

The contest is initiated not in the name of the people, but in the name of the contestor, for no authority is given by any statute to any public officer or private individual to institute an election contest in the name of the people. Its primary object is to determine the claim of the contestor to the particular office.²

¹ *Clanton v. Ryan*, 14 Colo. 419.

² *People v. Londoner*, 13 Colo. 310.

CONTENTS OF STATEMENT.

SEC. 210. The statement of intention to contest the election of a judge, whether supreme, district or county judge, must state the several matters specified in the above rule. The specification (4th) of the time of the election is particularly required to show that the notice of intention to contest has been filed in apt time, as limited by the rule. The fifth specification requires a statement of the particular grounds on which the contest is based. The grounds of contest specified in the statute seem to be applicable only to contests of county officers, other than county judges, but it is apparent that they will be good grounds for a contest in all cases, if the matters stated, supported by adequate proof, will suffice to change the result of the election, and give the office to the contestor.

GROUNDS FOR CONTESTING ELECTION.

SEC. 211. The first ground specified in the statute is fraud, malconduct or corruption on the part of the election judges of any election precinct, or of the board of canvassers of any county, or of the State board of canvassers, or of any member of such board, when such malconduct, fraud or corruption has contributed to changing the result of the election. In regard to the allegations of fraud to be made in the statement or petition, the Supreme Court says: "A

general averment of fraud should be treated as insufficient." ¹ The specific acts of fraud, malconduct or corruption should be stated, and by whom, and in whose interest they were committed, and whether they were committed by the advice, consent or connivance of the contestee.

Thus, where the election officers willfully and fraudulently rejected a sufficient number of votes offered by qualified voters of the precinct, which, if they had been received, would have elected the contestor, the names of the voters should be given and that they were duly qualified voters, entitled to vote in the precinct in which their votes were rejected. The statement should show how many candidates were voted for for the office contested at that election ; how many votes were given for each candidate for such office, and that if the fraudulently rejected votes had been counted the result of the election would have been different.

So, if it is claimed that illegal votes have been deposited and counted on the canvass of the vote, the petition or statement should show who the illegal voters were, and why they were not legal voters. This with the other facts above shown to be necessary to insert in the statement, will tend to show that such illegal votes operated to change the result of the election. But it has been held in some of the States, under the new so-called Australian ballot laws,

¹ Todd v. Stewart, 14 Colo. 286.

that in an election contest no allegation of the deposit of illegal votes is admissible, unless it is also alleged that such votes were challenged at the time of their deposit, and the challenge was overruled or disregarded by the election judges.

So, where it is claimed that the registers of the voters in the precinct fraudulently, willfully and corruptly struck from the registry, or willfully, corruptly and fraudulently added to the registry names, such names should be stated, and the precinct and county in which such acts were done.

As the main object of an election contest is to purge the ballot-box of illegal votes, and to correct the count of the votes, if it is alleged that an incorrect count was had by the canvassers, it seems that the court cannot count any vote for the contestor, unless it has been actually deposited in the ballot-box at the time of the election. Hence the statement of votes for the contestor, if they had not been illegally rejected, will have no effect on the contest other than as they may show such fraud as to require the court to reject the entire vote of that precinct.

Another ground of contest is that the contestee is ineligible to the office. This may arise from alienage, or not being a resident of the State or judicial district or county, the statutory period of time, as the case may be. In such case the statement should give the probative facts, and not merely the conclusions of the contestor.

STATEMENT CONTINUED.

SEC. 212. The statement or petition, besides averring that contestor is a qualified elector, as above stated, and the grounds upon which he contests, should also state when the board of canvassers met and declared the result of the election for the office in contest. The law only permits a contest to be initiated after the canvass has been made and the result of the vote declared.

CANVASS.—TIME OF FILING STATEMENT.

SEC. 213. The rule prescribes that the notice or statement must be filed within thirty days after the canvass by the State board of canvassers, in the case of a supreme or district judge, and within twenty days after the canvass by the county board of canvassers in the case of a county judge.

The statute prescribes that the State board of canvassers shall meet on the twenty-fifth, or in case the twenty-fifth be on Sunday, on the twenty-sixth day, after the day of the election, and if all returns are then in, shall proceed to canvass the said returns. If the returns are not in they may adjourn from time to time, until all of the returns are received. But whether all returns are received or not, the canvass must be made on the last Wednesday of December next after such election. The question to be determined when the

computation of the time for filing a statement is in issue is what is understood by the word "canvass" in the statute and rule.

Section 1202, in stating the duties of the county clerk and the associate justices, requires them to make out on separate sheets an "abstract" of the vote cast for judges of the Supreme Court, and on other separate sheets an "abstract" of the vote cast for district judge. These separate sheets are then sent to the secretary of State from each county in the State, and by section 1209, the State board of canvassers are required to tabulate such statements and ascertain who, of the persons voted for at such election for each office, has received the highest number of votes. If any two candidates for the same office receive an equal number of the votes cast for that office and the highest for such office, the State board must give the candidates between whom such tie exists notice of the time and place, and at such time and place determine by lot which of the two candidates shall receive the certificate of election. The result of such canvass must be certified to the secretary of State, who thereupon issues to the candidate who has received the highest number of votes a certificate of his election. In the case of *Bowler v. Eisenhood*, decided by the Supreme Court of South Dakota, February, 1891, this question was directly decided upon a statute almost literally identical with that of Colorado, and it was held

that the number of days for giving notice of contest dated from the public declaration of the vote, and in the case of a tie, from the decision by lot.

It seems, therefore, that the word "canvass" will be held to include every step in the proceeding until the certificate of the board of canvassers is made out and delivered to the secretary of State, in the case of supreme and district judges. The statute does not seem to prescribe the recording of any statement of the result of the votes for county officers, and hence the twenty days seem to begin from the day of the meeting of the county board of canvassers, on which they finally adjourned.

In the case of *Vailes v. Brown*, 15 Colo. 462, the Supreme Court held that the day of making the canvass of the votes must be excluded from the computation of time for filing the statement, since the word "after" is used in the law; but that the notice cannot be filed on Monday, if the last of the twenty or thirty days allowed for filing it be a "Sunday."

THE PETITION — CONTENTS.

SEC. 214. The statement or notice of contest is required to be verified by the affidavit of the contesting party, and is thereupon filed, in case of a county judge, in the office of the county clerk, and in the case of a district or supreme judge, in the office of the secretary of State, who are required to preserve the same in their respective offices.

Within, that is, *before the expiration of*, thirty days after the filing of the statement of contest, as required by rule 39, the contestor, or some one acting on his behalf or in his interest, is required to file a petition, duly verified by the oath of some credible person, in the office of the clerk of the Supreme Court. The petition shall set forth the filing of the statement of contest and the particular grounds therefor. Any ground of contest, which will show, that the result was procured by fraud, corruption of judges, their malconduct, or willful violation of the mandatory provisions of the election law, or that the person declared elected was ineligible at the time of the election is a good ground for contest. So also is the rejection of legal votes, or the admission of illegal votes by the election judges. Under the Election Acts of 1891 watchers and challengers are authorized at each polling place, and hence, if such watchers and challengers are improperly excluded from the place of election, the petition should show that the watcher had been duly selected in compliance with the statute, and his selection as a watcher made known to the election judges, and that by reason of the enforced absence of such watcher and challengers, persons who were not entitled to vote at such election were permitted to vote without proper investigation. So if it be alleged that in any precinct votes were received after the statutory hour for closing the polls had arrived, the number of such

votes should be stated, and the names of the persons so voting.

In stating the grounds of contest the contestor is to be governed by the rules of pleading, as to definiteness in his statements of his grounds of contest. But the fundamental and *essential averment* of the petition is that the result of the election was *different* from what it would have been had not the matters alleged as grounds of the contest occurred. For no matter what may have been the malconduct, or corruption of the judges, or other irregularities, if the result of the election would have been the same, no contest will lie, except where the contestee was ineligible.

PROCEDURE AFTER FILING PETITION — SUMMONS.

SEC. 215. Upon the filing of the duly verified petition, the clerk issues a summons, tested in the name of the chief justice, under the seal of the court, signed by the clerk and directed to the sheriff of the county where the defendant resides or may be found, which summons shall be returnable in not less than ten nor more than thirty days from its date, and shall command the defendant therein named to be and appear before the Supreme Court, by a day therein named, to answer to the complaint of the plaintiff in that behalf. The rule does not explicitly require a copy of the complaint to be served with the summons, but this requirement may be implied

from the rule that it be served in the same manner that like writs are served from a District Court, and that it be also served by copy.¹

Upon service of the summons the sheriff returns it to the clerk of the Supreme Court, with his certificate of service indorsed thereon, and it is thereupon filed in the action.

On the return day of such summons, if it appear from the certificate of service that due service of the writ has been made on the defendant named therein, if no appearance is entered for the defendant, the Supreme Court may enter his default and grant the proper relief, either with or without proof of the allegations of the complaint, as in its judgment is proper.

If defendant answer the petition he is required to file a properly verified answer. The petition and answer constitute the pleadings in the case. No replication to new matter set up in the answer is required, such new matter being deemed to be controverted by contestor at the hearing. The sufficiency of either petition or answer may be questioned by demurrer. Every material averment of the petition which is not controverted in the answer is to be deemed to be admitted. If either petition or answer be found defective on demurrer it will be permitted to be amended on terms.²

After the issues are made up the court decides the case without the intervention of a jury. As no con-

¹ Rule 41

² Rule 42.

stitutional provision requires a jury in civil cases the parties are not entitled to a jury, as a matter of right, and the practice of the Supreme Court does not admit of impaneling a jury in that court.

No oral testimony of witnesses is heard in open court. All evidence is written, being either the papers relating to the election contested, such as ballots and such like documents, and the evidence of witnesses taken by the respective parties by deposition.

After the issues are formed, and the questions to be determined by oral or written evidence ascertained, either party may have the deposition of any witness on his behalf taken before any judge (other than the contestee), clerk, notary, or justice of the peace, upon giving to the adverse party not less than ten days' notice of the time and place of taking such examination. At such examination either party may propound such interrogatories, direct, cross and redirect, as may be proper. No commission or written interrogatories are required. The rule seems to contemplate the following of the provisions of section 343 of the Code. No objection to the form of any interrogatory in the deposition will be entertained at the hearing, unless such objection was made at the time of taking the deposition, and is noted therein by the officer who took it. Upon the completion of the deposition of each witness, it shall be carefully read to him, and may be corrected by

him in any particular in which he may desire to correct it. It must then be subscribed by him and be sworn to by him. The officer taking such deposition must then certify to such deposition, stating in such certificate all facts necessary to show that the deposition has been properly and duly taken; and after making such certificate under his hand and seal, if he have one, he must inclose such deposition in an envelope or wrapper, and transmit it to the clerk of the Supreme Court, properly indorsed with the title of the cause. When so transmitted and filed, either party may use such deposition at the hearing, subject to all legal exceptions.¹

Except the oral examination of witnesses, which is unusual, but may be had at the option of the court when the court considers it desirable, and the trial by jury, all the rules as to course of procedure at the trial, and as to the admissibility, relevancy and exclusion of evidence, as prescribed in trial courts, are followed on the trial of the contest so far as they may be capable of application thereto. As no review of the cause can be had in any other court, by appeal or writ of error, a bill of exceptions is not taken, though exceptions may be taken and reserved, to be used on a motion for a new trial or rehearing, that the court may, on such rehearing, review its rulings at the trial, and change or modify them in the final decision.

¹ Rule 43.

The court then follows the usual course of the court, and places the cause on the submission docket for final determination and a written opinion. It makes all orders and issues all writs proper to enforce and carry into effect its judgment and decision in the case, adjudges the costs against the losing party, and acts in all respects, in such cases, in the same manner as a trial court does. There is in the reports no case of the contest of an election of a supreme judge, but one case unreported, and at this writing undetermined, of a contest in the case of a district judge, which is probably to be found in the 17th vol. of Colorado Reports, when published, and only a few cases of contests of the election of county judges. Hence but a few decisions can be cited from the Colorado Reports, though many of the decisions made in the cases of election contests brought to the Supreme Court from trial courts will be found applicable in matters which occur in both classes of cases.

The foregoing pages conclude this little book on Procedure in the Courts of Review of the State of Colorado, as indicated by the decisions of the Supreme Court of the State.

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